THE JOURNAL OF
AIR LAW AND COMMERCE

VOLUME 15 SUMMER, 1948 No. 3

THE EFFECT OF TARIFF PROVISIONS FILED UNDER THE CIVIL AERONAUTICS ACT

By D. W. MARKHAM AND DRURY H. BLAIR

Mr. Markam, Assistant General Counsel, Air Transport Association; Colgate University, A.B., 1931; University of North Carolina, J.D., 1936; member North Carolina and District of Columbia Bars. *Formerly*, Legislation Section, Office of the General Counsel, U. S. Treasury Department; Assistant Professor of Law, University of North Carolina Law School; General Counsel's Office, Civil Aeronautics Board.

Mr. Blair, Legal Department, Air Transport Association; University of Virginia, L.L.B., 1937; member Virginia and Florida Bars. *Formerly*, general practice, Wideman, Wardlaw and Caldwell, West Palm Beach, Florida; Legal Staff, Farm Credit Administration; General Counsel's office, Office of Price Administration.

INTRODUCTION

ALTHOUGH the Civil Aeronautics Act (Act) of 1938[1] has some features which are unique, it approaches most of the problems of common-carrier regulation along well-beaten paths. The Act's requirement, for example, that air carriers file tariffs and adhere to their provisions was anything but an innovation. It could find antecedents in dozens of federal and state public utility statutes. It was a regulatory device which had stood the test of experience—of administrative interpretation and application and of judicial scrutiny, in scores and scores of cases. Its purposes were clear and, with such a rich heritage of statutory and decisional precedent, one would have supposed that its effects were too. But in the ten years since the enactment of the Civil Aeronautics Act, the requirement has proved to be a source of controversy and debate — and some litigation.

What is the effect of the requirement upon the relationship between the carrier, on the one hand, and a passenger or shipper, on the other? The Act expressly requires that the carrier adhere to its tariffs; but are the tariffs equally binding on either passenger or shipper? For example, may the latter rely upon special terms and conditions of the contract of carriage not embodied in the tariffs? May he attack tariff

[1] 52 Stat. 973, 49 USCA §401 *et seq.* (Supp. 1947).

provisions retroactively and avoid their application to him? May he, after receiving the transportation, attack the tariff rate as unlawful and recover damages? May he escape a tariff provision establishing a limit on the carrier's liability on the ground that it is invalid? If so, in what forum are those remedies available, and what tests or standards of validity are to be applied? Does the Civil Aeronautics Board (CAB) have primary jurisdiction to pass on the lawfulness of tariff provisions, or may a court assume such jurisdiction? In either event, are the standards of lawfulness prescribed by the Act exclusive, or can the question be considered as a matter of general law?

These are typical questions which have been raised repeatedly since the Act became effective. The few reported decisions do not answer them either completely or consistently. It is appropriate, therefore, to examine them further. A thorough consideration of all of them would not be possible in one article, but an effort will be made to find the correct answers to some of them, so that the legal effects of the tariff-filing requirement will be clear, at least in general outline.

Before undertaking to examine the principal questions, it might be well to consider briefly the purpose of the tariff-filing requirement, as evidenced by its historical background, and by the relevant provisions of the Act itself.

Historical Background of the Tariff-filing Requirement

The precise origin of the notion that a person engaged in a public calling should be required to publish tariffs, setting forth his charges and other terms of his offer to serve the public, does not seem to be known. There is evidence that it was employed, both in this country and in England, prior to the adoption of the Interstate Commerce Act (ICA) in 1887, but its principal development as a regulatory device stems from experience under that Act.[2]

Prior to enactment of the ICA, railroads had been relatively free to pursue their business without legislative interference. Discrimination, through preferences to favored individuals and localities, was rife. Practices of railroads have been characterized as a system of secret and special rates, rebates, drawbacks and concessions for the purpose of fostering monopoly and preventing free competition.[3] Public reaction against those discriminatory practices appears to have been manifested first through the Granger Movement following the

[2] 24 Stat. 379 (1887), 49 USCA §1 *et seq.* (Supp. 1947). Originally enacted as the "Act to Regulate Commerce," it became the "Interstate Commerce Act" by a provision in the Transportation Act of 1920 (41 Stat. 499); and by a provision of the Motor Carrier Act, 1935 (49 Stat. 543), the Act as it stood became "Part I" with specific provision that it might continue to be cited as the "Interstate Commerce Act," and Part II, which was added, might be cited as the "Motor Carrier Act, 1935." The special designations of Parts I and II for citation purposes were eliminated by the Transportation Act of 1940 (54 Stat. 919) and the four parts of the ICA are now to be cited as such.

[3] In the Matter of Underbilling, 1 ICC 633, 634 (1888).

Civil War.[4] The Movement resulted from the clamor of small farmers in the Middle West against maintenance of high transportation charges in face of falling grain prices. Rate wars among railroads were prevalent and resulted in fluctuating rates between competitive points, but high rates between non-competitive points remained virtually unchanged. Feelings ran high during this period, and there were charges that railroads, controlled by Eastern capital, were attempting to dominate the economic life of farmers and of the Middle West.[5] Initially, the Movement seems to have been directed against extortionate charges made by railroads, and agitation for maximum-rate laws appears to have had as its object simply the securing of cheaper transportation.[6] Illinois first initiated legislation to regulate railroads. In 1870 a clause was incorporated into the state constitution, authorizing enactment of such laws, and in 1871 an act was passed which prescribed maximum rates, prohibited discrimination and established a railroad and warehouse commisison with power to prescribe schedules of reasonable maximum rates. Similar legislation was adopted shortly thereafter by Iowa, Michigan, Minnesota, Wisconsin, and Missouri.[7] While this early state legislation dealt mainly with establishment of maximum rates, discriminatory practices of railroads were not being overlooked.[8]

These attempts at regulation of railroad rates proved weak and ineffective. In 1886 the Supreme Court handed down its decision in *Wabash Ry. Co. v. Illinois,*[9] in which it asserted the exclusive right of federal control of interstate commerce by railroad, even as to that portion within boundaries of a state and in absence of congressional action in that field. This decision removed the majority of railroad traffic from state control and accentuated the necessity for effective regulation. It was in response to those conditions that federal authority over the railroads was asserted by Congress through passage

[4] *Munn v. Illinois*, 94 U.S. 113 (1877); *Chi., Burl. & Q. R. R. v. Iowa*, 94 U.S. 155 (1877); *Peik v. Chi. & N. W. Ry.*, 94 U.S. 164 (1877); *Chi., M. & St. P. R. R. v. Ackley*, 94 U.S. 179 (1877); *Winona & St. P. R. R. v. Blake*, 94 U.S. 180 (1877); *Stone v. Wisconsin*, 94 U.S. 181 (1877).

[5] 2 HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS 240; 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 14, 15.

[6] The Granger Movement proper seems to date back to the Farmers' Anti-Monopoly Convention held in Des Moines, Aug. 13, 1873, where it was resolved to agitate for maximum-rate laws. 2 HANEY, *op. cit. supra* note 5, at 240.

[7] There had also been consideration of rate regulation in Congress. As early as 1869 a resolution had been introduced in the House of Representatives charging trunk lines with consolidation and monopoly resulting in exorbitant and unequal charges on agricultural products bound for the eastern seaboard. Alleging that tariffs on the East Coast discriminated against the West, it was requested that the power of Congress to regulate railroad rates be clarified. And, in 1874 the House had passed the McCrary Bill which forbade unreasonable charges and provided for prescription of maximum rates by railroad commissioners. *Id.* at 243, 244, 255.

[8] Three bills directed against discriminatory practices by railroads were introduced in Congress in 1872 which were followed by bills in 1873, 1874, and five bills in 1875. Complaints were also made against the practice of manipulating railroads to control the petroleum and anthracite coal industries which were accompanied by discriminatory practices. *Id.* at 285, 287.

[9] 118 U.S. 557 (1886).

of the original ICA in 1887.[10] That Act was primarily directed at elimination of excessive charges and discriminatory practices.[11] The emphasis, however, was on discrimination.[12]

In the Cullom Report,[13] which formed the basis for subsequent enactment of the ICA, there appears a clear explanation of the evils at which the legislation was directed:

> ". . . The theory of the common law is that all who are situated alike must be treated alike. Unjust discrimination is the chief cause of complaint against the management of railroads in the conduct of business, and gives rise to much of the pressure upon Congress for regulative legislation. The railroad companies do not recognize as they should the fact that they sustain a different relation to the public from persons engaged in ordinary business enterprise. Railroad companies are not disposed to regard themselves 'as holding a public office and bound to the public' as expressed in the ancient law. They do not deal with all citizens alike. They discriminate between persons and places, and the States and Congress are consequently called on to in some way enforce the plain principles of the common law for the protection of the people against the unlawful conduct of common carriers in carrying on the commerce of the country."

The Interstate Commerce Commission (ICC), in its First Annual Report described the situation in the following words:

> "Those who have controlled the railroads have not only made rules for the government of their own corporate affairs, but very largely also they have determined at pleasure what should be the terms of their contract relations with others, and others have acquiesced, though oftentimes unwillingly, because, they could not with confidence affirm that the law would compel it, and a test of the question would be difficult and expensive. The carriers of the country were thus enabled to determine in great measure what rules should govern the transportation of persons and property; rules which intimately concerned the commercial, industrial, and social life of the people." [14]

It seems clear that the original requirement that tariffs be published and posted was aimed at the discriminatory practices of the railroads. In the Cullom Report, the committee expressed the view that one of "the chief purposes of any legislation for the regulation of interstate commerce should be to secure the fullest publicity both as to charges made by common carriers and as to the manner in which their business is conducted"; and went on to say that reasonableness and uniformity in rates could not be secured without publicity, "which is the surest and most effective preventive of unjust discrimination."[15]

---

[10] See 1 SHARFMAN, *op. cit. supra* note 5, at 1-21.

[11] See *ICC v. B. & O. R. R.*, 145 U.S. 263 (1892); 2 HUTCHINSON, LAW OF CARRIERS §527 (3d ed., 1906).

[12] 2 HANEY, *op. cit. supra* note 5, at 291.

[13] Sen. Rep. No. 46, 49th Cong., 1st Sess. 40 (1886). This was a select committee appointed to investigate and report upon the subject of regulation of transportation of freight and passengers between the several states by railroad and water routes. Senator Cullom subsequently introduced S. 1532 on Feb. 16, 1886, which was ultimately enacted as the original ICA in 1887.

[14] 1 Annual Rep. of ICC 4 (1887).

[15] Sen. Rep. No. 46, 49th Cong., 1st Sess. 198 (1886).

It was pointed out by the committee that, while it was customary for the railroads to print tariffs for guidance of their agents and information to the public, they were subject to change as circumstances demanded. The light of publicity upon published tariffs was believed to be the most effective deterrent to discrimination.[16]

This theory was embodied in the ICA, and the importance in the scheme of regulation was attested in the following language:

> "The chief object of the act to regulate commerce is the prevention of discrimination. Carriers being engaged in a public employment must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by successive acts to regulate commerce. The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discrimination. If this portion is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminatory rates. Whenever discriminatory rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality. The failure of any carrier to properly file and publish its rates is quite as serious a violation of the act to regulate commerce as a failure to observe such rates after they have been properly filed and published." [17]

To be sure, experience under the ICA soon demonstrated that a mere requirement that tariffs be published was not a cure-all. Such a provision had to be buttressed with an adequate system of penalties and with effective administrative control over carrier rates and practices.[18] But its usefulness in combating discrimination remained un-

---

[16] *Id.* at 198-208 (general discussion of the importance of publicity). See also 1 SHARFMAN, *op. cit. supra* note 5, at 21, 22, 42, 43.

[17] *U.S. v. Illinois Terminal R. R.*, 168 Fed. 546, 549 (S. D. Ill. 1909). See also *U.S. v. Chi. & A. Ry.*, 148 Fed. 646, 648 (N. D. Ill. 1906); 2 WYMAN, PUBLIC SERVICE CORPORATIONS 1140-1 (1911).

[18] From the beginning, Section 6 of the ICA contained requirements that carriers publish and post schedules of rates and all classifications, rules and regulations which in any wise affected such rates, and elsewhere, a positive duty was imposed upon carriers to maintain just and reasonable rates, and departures from published rates were prohibited, with provision made for civil liability for violations of the ICA, as well as criminal penalties for unjust discrimination. However, the legislation proved ineffective due to denial of the authority of the ICC to prescribe rates for the future in *ICC v. Cincinnati, N. O. & T. P. Ry.*, 167 U.S. 479 (1897), difficulty encountered by the ICC in obtaining effective enforcement of its orders and reluctance of courts to impose criminal sanctions. The force of the tariff was considerably enhanced by amendments to the ICA effected by the Elkins Act of 1903 (32 Stat. 847) which imposed greatly increased penalties in the nature of fines for failure to publish tariffs and for departures therefrom, which were made applicable to the carrier corporation whereas previously they applied only to the carrier's agent responsible for the discrimination. The most significant amendatory legislation increasing effectiveness of tariffs resulted from the Hepburn Act of 1906 (34 Stat. 584), which, in addition to strengthening the sanctions against rebates by restoring the imprisonment penalty and subjecting the shipper to penalties for accepting rebates, granted the ICC authority, after a hearing upon a complaint, to prescribe maximum rates and regulations or practices for the future. Furthermore, the requirement was added that tariffs be *filed* with the ICC. The ICC's control over tariffs was further amplified by amendments included in the Mann-Elkins Act in 1910 (36 Stat. 539), which granted the ICC authority to suspend proposed changes in rates, to prescribe tariff rates and rules for the future on its own initiative with specific inclusion of

questioned. It survived many amendments which the ICA underwent, and became an accepted and recognized part of the pattern of regulation — a pattern which has been widely copied in other state and federal statutes, including the Civil Aeronautics Act.

Provisions of the Civil Aeronautics Act

Students of public regulation will find that tariff-filing and rate provisions of the Act fall into a generally familiar pattern.[19] However, since the questions to be considered are essentially problems of statutory construction, we should examine the language of the relevant provisions.

The Act first requires filing of tariffs. Section 403 (a) [20] provides, in part:

> "Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void."[21]

Strict observance of its filed tariffs is then enjoined upon the carrier.

> "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein."[22]

Departure from the tariff is made a criminal offense.[23]

---

tariff rules within the power. And, under amendments included in the Transportation Act of 1920 (41 Stat. 456), the ICC's power over tariffs was extended to include prescription of specific or minimum rates and to adjust intrastate rates when they were found to result in an undue discrimination against interstate commerce.

[19] Other than those applicable to rates for the transportation of mail.

[20] 52 Stat. 992, 49 USCA §483(a) (Supp. 1947).

[21] The CAB has, pursuant to the authority granted by this section, promulgated regulations governing the form and content of tariffs to be filed by carriers, and has required that tariffs contain rules and regulations "which in any way affect the rates named in the tariff, or the service under such rates." Economic Regulations, §224.1, particularly paragraphs A-3, A-4, and E-7. 14 Code Fed. Regs. §224.1 (Cum. Supp.).

[22] Sec. 403(b); 52 Stat. 992, 49 USCA §483(b) (Supp. 1947).

[23] Sec. 902(a) and (d); 52 Stat. 1015, 49 USCA §622(a) and (d) (Supp. 1947).

Tariffs may be changed only after notice.

> "No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified . . . ."[24]

In order to insure that the tariffs themselves will provide for fair and equal treatment to all comers, a positive duty is imposed upon carriers "to establish, observe, and enforce just and reasonable individual joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to . . . air transportation",[25] and discrimination resulting from application of tariff provisions is specifically prohibited.

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[26]

However, sole reliance is not placed upon the carriers. The CAB is given authority to suspend a tariff provision before it can go into effect if it has reason to believe that the provision departs from requirements of the Act. Section 1002 (g) [27] provides:

> "Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days

[24] Sec. 403(c); 52 Stat. 993, 49 USCA §483(c) (Supp. 1947).
[25] Sec. 404(a); 52 Stat. 993, 49 USCA §484(a) (Supp. 1947).
[26] Sec. 404(b); 52 Stat. 993, 49 USCA §484(b) (Supp. 1947).
[27] 52 Stat. 1019, 49 USCA §642(g) (Supp. 1947).

> beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided,* That this subsection shall not apply to any initial tariff filed by any air carrier."

Furthermore, even after a tariff provision has taken effect, the Board is given ample authority to investigate and determine its lawfulness. Sections 1002 (a) and (b) [28] authorize the Board to conduct investigations, either on complaint or on its own initiative, of any alleged or suspected violation of the Act, and Section 1002 (d) [29] provides that:

> "Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge."

Special provision is also made for correction of discrimination in foreign air transportation.

> "Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge, or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice."[30]

Thus, a carrier is permitted initially to determine rates which it will charge and other terms and conditions upon which it will offer

---

[28] 52 Stat. 1018, 49 USCA §642(a) and (b) (Supp. 1947).
[29] 52 Stat. 1018, 49 USCA §642(d) (Supp. 1947).
[30] Sec. 1002(f); 52 Stat. 1019, 49 USCA §642(f) (Supp. 1947).

its services to the public. Those rates and terms and conditions must, however, be embodied in tariffs published and filed with the Board. They must be just and reasonable and non-discriminatory, and they must be strictly adhered to. Departure from any tariff provision subjects the carrier to criminal penalties, and, in the event rates or terms and conditions of the carrier's offer do not comply with standards established by the Act, the CAB may either suspend offending provisions before they take effect, or correct them later.

There is one other provision of the Act which accounts for much of the confusion which has existed concerning the legal effect of the Act on the relationship between carrier and passenger or shipper. Section 1106[31] provides that "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

With this historical background and Provisions of the Act before us let us now turn to some major questions which have arisen concerning the effect of tariffs filed under the Act.

Are Tariff Provisions Filed Under the Civil Aeronautics Act Conclusive Evidence of the Contract of Carriage?

Cases Under the Insterstate Commerce Act

As we have seen, a carrier subject to the Civil Aeronautics Act is required to publish and file tariffs containing his rates and rules,[32] which, taken together, constitute the terms of its offer to serve the public. The Act expressly prohibits the *carrier* from deviating from published terms; any departure is punishable as a criminal offense. But nowhere does the Act say in so many words, that the other contracting party — passenger or shipper — is similarly restricted. What, then, is the effect of the Act upon the contractural relationship of the parties? Is the tariff equally binding upon passenger or shipper? Are they to be deprived of a special term of the contract, even though the carrier committed a criminal offense by agreeing to it? Is the requirement of the Act that the carrier adhere strictly to its tariff a sort of statutory parol evidence rule?

One of the first indications of the effect of a filed tariff upon the contract of carriage appeared in *Gulf C. & S. F. Ry. v. Hefley & Lewis.*[33] In that case furniture was shipped from St. Louis, Missouri, to Texas consignees at the revised rate appearing in the filed tariff, but delivery was refused at destination because the agent insisted on payment of a higher rate appearing in an unrevised tariff. A Texas statute made the bill of lading binding on the parties and provided for recovery of damages for each day delivery of goods was refused after a

[31] 52 Stat. 1027, 49 USCA §676 (Supp. 1947).

[32] Hereafter, we shall use the word "rates" as shorthand for the statutory "rates, fares, and charges," and the word "rules," for "classifications, rules, regulations, practices, and services."

[33] 158 U.S. 98 (1895).

tender of charges in the bill of lading. In reversing a recovery by the shipper in the state court, the Supreme Court pointed out that under Section 6 of the ICA, the carrier was required to file its tariff and was subject to penalties for any departure therefrom. Therefore, the Court reasoned, the Texas statute making the terms of the bill of lading controlling was of no effect, and recovery could not be sustained. With the exception of *Van Patten v. Chicago, M. & St. P. Ry.*,[34] in which it was held that the filed tariff was the only standard to be considered by courts and juries in determining whether the rate charged was unreasonable and that no recovery could be had unless the rate exceeded that filed, there was no further consideration of the relationship of filed tariffs to the contract of carriage until the penalties for departure from the filed tariff and against rebates had been extended by the Elkins Act and the Hepburn Act.[35]

As far as rates are concerned, courts quickly concluded that the filed tariff is conclusive evidence of the terms of the contract. Commencing with *Texas & Pacific Ry. v. Mugg & Dryden*,[36] a long line of cases established the rule that the filed tariff controls the rate, and is equally binding on both carrier and shipper or passenger. The courts frequently referred to the filed tariff as being "impressed with the force of law," but this was simply a short way of saying that the tariff embodied terms and conditions upon which the carrier offered its services to the public; that, since the carrier could not legally deviate from those terms, the passenger or shipper was bound to accept them when he used the carrier's services; and, therefore, that the tariff is, by force of law, sole evidence of the terms of the contract of carriage.

The *Mugg & Dryden* case[37] involved an action to recover additional charges which the shipper had been required to pay over quoted rates. The rates paid were in accordance with the filed tariff. A recovery by the shipper in a Texas court was reversed on the ground that the tariff filed with the ICC established the rate to be charged, regardless of any agreement between the parties as to a different rate.[38]

The same principle was applied to passenger tariffs in *Louisville & Nashville R. R. v. Maxwell*.[39] A passenger purchased a round-trip ticket, but the agent mistakenly quoted a fare lower than that applicable under the filed tariff. The carrier was denied recovery for the additional fare in a state court. On appeal, the Supreme Court held that the carrier was entitled to recover the additional fare, since the filed tariff fixed the only rate that could be charged and there could be no departure from the filed rate even in the case of a mistake

[34] 81 Fed. 545 (W. D. Iowa 1897).
[35] 32 Stat. 847 (1903), 49 USCA §41 (1940); 34 Stat. 587 (1906), 49 USCA §41 (1940).
[36] 202 U.S. 242 (1906).
[37] *Ibid.*
[38] The *Hefley & Lewis* case was cited in support of this position. 158 U.S. 98 (1895).
[39] 237 U.S. 94 (1915).

made in good faith by the carrier and passenger. The Court said:[40]

> "Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

The rule has been followed in numerous cases.[41]

While tariffs filed under Part I of the ICA have been clearly recognized as conclusive evidence of the rate provisions of the contract of carriage, tariff rules have not always been accorded the same treatment. Section 6 required filing of rules as well as rates, but for some time after passage of the ICA, courts were inclined to treat tariff rules as contractual terms only if agreed to by the parties and subject to common law principles the same as before the advent of the regulatory legislation.[42]

Judge v. Northern Pac. Ry.[43] exemplifies the early attitude of courts toward tariff rules and indicates the ease with which the rules could be circumvented. A theatrical performer traveled with a chimpanzee which was placed in the regular baggage car since there was no room in the special baggage car. Through the negligence of the railroad's agents in placing the animal next to a steam radiator, it was killed; but the railroad disclaimed liability under a filed tariff provision which prohibited the transportation of the animal in the regular baggage car. The court held that while the contract of carriage was in contravention of the filed tariff provision and therefore

---

[40] *Ibid.*

[41] *Loomis v. Lehigh Valley R. R.*, 240 U.S. 43 (1916) (denying recovery for sums expended in converting cars when not provided for in tariff); *Lehigh Valley R. R. v. U.S.*, 243 U.S. 444 (1917) (enjoining railroad's practice of allowing a freight forwarder a commission based on the published tariff rate and a yearly salary since it constituted a departure from the tariff); *Pittsburgh, Cinn., etc. Ry. v. Fink*, 250 U.S. 577 (1919) (shipper required to pay published rate where carrier made undercharge); *New York C. & H. R. R. R. v. York & Whitney Co.*, 256 U.S. 406 (1921) (recovery of balance of freight charges resulting from erroneous undercharge); *Crancer v. Lowden*, 315 U.S. 631 (1942) (shipper bound to pay freight under classification in tariff as construed by ICC); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) (shipper could not disclaim liability for expense of installing grain doors where provision was made in tariff for such expense). The ICC, in *A. J. Poor Grain Co. v. Chicago, B. & Q. Ry.*, 12 ICC 418 (1907), asserted this same concept of the filed tariff rate when it was stated that the filed rate was the only lawful rate and no departure would be permitted even where the agent of carrier was negligent in quoting the rates.

[42] *Cau v. Texas & P. Ry.*, 194 U.S. 427 (1904) (recognizing limitation appearing in bill of lading only); *Northern P. Ry. v. American Trading Co.*, 195 U.S. 439 (1904) (special undertaking to forward by certain steamship enforced though inconsistent with bill of lading); *Empire State Cattle Co. v. A. T. & S. F. Ry.*, 210 U.S. 1 (1908) (deviation from route held justified apart from contract); *Missouri, K. & T. Ry. v. Patrick*, 144 Fed. 632 (C. C. A. 8th 1906) (unsigned bill of lading held no contract but only evidence of oral contract).

[43] 189 Fed. 1014 (Ore. 1911).

void, nevertheless, the carrier, by accepting the property, became a bailee and, in absence of a binding contract limiting its liability was subject to the duties of a common or private carrier as the facts might establish. The carrier's liability was said to arise out of the contract of affreightment and duties and obligations imposed upon it by the ICA.[44]

The first indication of judicial recognition of a filed tariff rule as conclusive evidence of a term of the contract of carriage appeared in two early cases in lower federal courts: *Baltimore & O. R. R. v. Hamburger*[45] and *Louisville & N. R. R. v. Dickerson.*[46] The *Hamburger* case involved a suit in equity by the railroad to enjoin the defendant from dealing in non-transferable passenger tickets. The injunction was denied on the ground that, under Section 6 of the ICA, the railroad was required to file tariff provisions affecting rates charged or value of the services rendered, and since the non-transferability provision was not included in the filed tariff, it was void. The court had this to say:[47]

> "Whatever may be said of stop-over and such like advantages, the sale and transfer of the ticket is not only a privilege, but a right which directly enters into and affects the value of the ticket; and hence, if either the right is to be denied or the privilege abridged, under the plain language of the act in question, it must be shown in the published tariff and schedule of the company. The requirement in this respect is quite as positive as the one providing for publication of schedules showing such rates and charges, and prohibiting deviation therefrom."

In the *Dickerson* case the railroad received a shipment as initial carrier for transportation over its own line and lines of other carriers under a joint through rate established and filed with the ICC. The tariff made no provision for diversion of the shipment. The bill of lading, however, provided that the shipper would bear any increased costs in case of a change of routing because of necessity. The shipment was rerouted because of the refusal of a connecting carrier to accept the shipment and the shipper paid the additional charges. Subsequently, the shipper obtained a reparations order from the ICC,[48] awarding him the amount of the additional charges. The railroad refused to pay and the shipper sued. In holding that the shipper was entitled to recover, since any special contract in the bill of lading at variance with the filed tariff was void, the court made this comment:[49]

> "It seems clear that the regulation in question immediately affected the rates for shipment between the points indicated. It

[44] The Supreme Court had issued earlier a dictum that where goods were transported under a contract at variance with published tariff rates, the contract was void, but that the contract of affreighment was not void and the carrier would be liable for its negligence. See *Merchants Cotton Press & S. Co. v. Ins. Co. of North America*, 151 U.S. 368 (1894).

[45] 155 Fed. 849 (E. D. Va. 1907).

[46] 191 Fed. 705 (C. C. A. 6th 1911).

[47] 155 Fed. 849, 851 (E. D. Va. 1907).

[48] *Woodward & Dickerson v. L. N. R. R.*, 15 ICC 170 (1909).

[49] 191 Fed. 705, 710 (C. C. A. 6th 1911).

> directly increased the lawfully established and agreed compensation for the carriage. A regulation having such effect is required to appear in defendant's tariff, and not so appearing is ineffective."

In reaching this conclusion, the court cited with approval the *Hamburger* case; but history of the two cases does not reveal further reference to their holdings.

Similarly, in *Chicago & Alton R. R. v. Kirby,*[50] the carrier and shipper had entered into a special agreement for the expedition of a shipment of horses. No extra charge was to be made for the special service. The carrier failed to fulfill the agreement, and the shipper recovered damages in a state court. In reversing the decision of the state court, the Supreme Court held that the shipper and carrier were bound by the filed tariff which made no provision for such special service, and that to recognize the agreement would give effect to an undue preference. In its opinion the Court said:[51]

> "The broad purpose of the commerce act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contemplated by the defendant in error. To guarantee a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs . . ."

The landmark in this field is *Adams Express Co. v. Croninger.*[52] A shipper delivered a small package containing a diamond ring to the express company for transportation from Kentucky to Georgia. Upon non-delivery of the package, he brought action in a Kentucky court to recover full market value of the ring. Provisions in the receipt and in tariffs of the express company filed with the ICC required the value of a shipment to be declared and limited liability for loss to $50 if the value was not declared. Rates for shipments valued in excess of $50 were graduated under the tariffs. A Kentucky statute invalidated such limitations of liability, and the shipper recovered full value of the ring. In reversing the state court decision, the Supreme Court concluded (1) that a contract for an interstate shipment of goods, as evidenced by a receipt or bill of lading, was governed by provisions of the ICA rather than by state law; (2) that a provision in the receipt or bill of lading and filed tariff limiting liability of the carrier to an agreed value, and fixing rates proportionate to risk, was valid under general law as applied in federal courts; and (3) that the shipper was presumed to have knowledge of filed tariff provisions and was therefore bound by the provision.[53]

---

[50] 225 U.S. 155 (1912).
[51] *Ibid.*
[52] 226 U.S. 491 (1913).
[53] The decision in the *Croninger* case was rendered against a background of diverse legislative and judicial treatment of the question of the right of interstate common carriers to exempt themselves from all or part of their common-law liabilities by tariff rules. The result was confusion and it was practically impossible for a carrier to determine with any reasonable degree of certainty what his responsibilities were in this respect. The Court apparently seized upon provi-

Following the *Croninger* case, a number of decisions affirmed the binding effect on carrier and shipper of filed tariff rules providing for a limitation of the carrier's liability for property loss or damage in interstate shipments, based upon released values with a choice of rates proportionate to risks assumed.[54] *Boston & Maine R. R. v. Hooker,*[55]

sions of the Carmack Amendment (present Section 20(11)) to the Hepburn Act of 1906, enacted ten years earlier, as a basis for asserting federal control over this question. The Carmack Amendment provided in substance that an interstate common carrier should issue a receipt or bill of lading and would be liable to the shipper for any loss or damage "caused by it" or by any connecting carrier; that the carrier could not exempt itself from liability imposed by any contract, rule or regulation; and that nothing in the Amendment would deprive a holder of a bill of lading of any remedy or right of action under existing law.

The Court construed this language to mean that Congress had exercised its conceded authority to regulate the interstate carrier's liability for property offered for transportation, and its action superseded all policies of the states on the same subject. In determining the liability imposed upon a carrier under the Amendment, the Court reasoned that in view of the language "any loss, damage, or injury to such property caused by it," it was not the intent to make the carrier an absolute insurer, but only to impose liability for some breach of its common-law duty in view of the qualifying phrase "caused by it." This was held to show that Congress had evidenced an intent to regulate the liability of interstate carriers of property. Having made this determination, the Court found the tariff provisions binding and valid since under the established rule of common law in federal courts, a carrier could by agreement limit its liability for property loss to an agreed value based upon a choice of rates proportionate to the amount of risk assumed. In 1915 the ICC, in commenting indirectly on the result of the *Croninger* case, pointed out that the primary purpose of the Carmack Amendment was to impose liability on the initial carrier for property received for interstate transportation on account of any loss or damage to the property caused by it or any other connecting carrier; and that it did not undertake to prescribe or limit terms of the bill of lading, but rendered them void to the extent of any attempted limitation of liability. *Louisiana State Rice Milling Co. v. M. L. T. R. & S. S. Co.*, 34 ICC 511, 512.

[54] *Chicago, St. P., M. & O. Ry. v. Latta*, 226 U.S. 519 (1913); *Missouri, K. & T. Ry. v. Harriman Bros.*, 227 U.S. 657 (1913); *Kansas City S. Ry. v. Carl*, 227 U.S. 639 (1913); *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U.S. 469 (1913); *Great Northern Ry. v. O'Connor*, 232 U.S. 508 (1914); *Atchison, T. & S. F. Ry. v. Robinson*, 233 U.S. 173 (1914); *Atchison, T. & S. F. Ry. v. Moore*, 233 U.S. 182 (1914).

The ICC's observation of the effect of the *Croninger* case was stated as follows:

> ". . . Following the decision in that case there was a distinct change of policy on the part of carriers, generally, in the adjustment of claims made upon them for loss, damage, or injury to property. From a former policy of compromise, of making the best terms possible with the claimant, which was not wholly disadvantageous to the claimant in many instances, and which, of course, was often discriminatory in its operation, a disposition was developed upon the part of many carriers to stand uncompromisingly upon their rights as defined in the bill of lading. . . .
>
> "Prior to the decision in the *Croninger* case, *supra*, there had been much conflict in the decisions, both of the federal and state courts, upon the question of validity of conditions in bills of lading which limited or sought to limit the amount of the carrier's liability for loss, damage, and injury to goods transported. The proviso in the amendment had been construed by both federal and state courts to preserve to the shipper the remedies then existing under state laws when the latter were more advantageous to him than the remedy provided by federal law, and so the rules were interpreted differently according to the jurisdiction in which the case arose. The *Croninger* case held that it was the purpose of Congress to assume jurisdiction in the fixing of the carrier's liability upon interstate shipments, and thereafter such questions were generally construed in the light of the decision in that case, in which it was held that a contract for transportation containing a stipulation of value to which the carrier's liability was sought to be limited was valid and not in violation of the provision of the act." In the Matter of Bills of Lading, 52 ICC 671, 677, 683 (1919).

[55] 233 U.S. 97 (1914).

extended the rule of the *Croninger* case to a tariff rule governing liability for baggage. Previously, the cases dealing with rates based upon released values had involved shipments of property moving under express receipts or bills of lading specifying limitations of liability, although those cases had also accorded recognition to filed tariff provisions. The *Hooker* case involved a limitation-of-liability provision appearing only in the filed tariff, and it was conceded that the passenger had no actual notice of the rule. The rule limited liability for baggage loss or damage to $100 unless a greater value was declared and excess charges paid based upon valuation. The passenger declared no value and no inquiry was made as to value upon acceptance. In an action in a Massachusetts court, the passenger recovered actual value of the baggage on the theory that the ICA did not change the common-law rule in Massachusetts that such limitations were void unless brought to the attention of the passenger and assented to by him. The Supreme Court reversed the decision, stating: "The effect of the filing gives the regulation as to baggage the force of a contract determining 'baggage liability.' "[56]

As a result of these decisions, use of released value rates became widespread. Congress in 1915 enacted the First Cummins Amendment[57] which revised Section 20 (11) of the ICA (the Carmack Amendment). In effect, this Amendment made the carriers liable for full actual loss or damage to property notwithstanding any limitation of liability, limitation of amount of recovery, or agreement as to value. These provisions were modified by the Second Cummins Amendment[58] of 1916, which permitted released value limitations in connection with baggage and, as authorized by the ICC, in connection with other property, except livestock. Congress thus supplied standards for determining validity of tariff rules establishing limitations of liability and filed under the ICA. The force of cases decided prior to these amendments would not, however, seem to have been weakened; rather, it is strengthened by legislative recognition of the conclusive effect of such tariff provisions when filed pursuant to a regulatory statute.

Following the Cummins Amendments, there were additional released value cases asserting the binding effect of tariff rules establishing limitations permitted by the legislation.[59] In *N.Y.C. & H.R.RR v. Beaham*,[60] action was brought to recover full value of baggage lost by an interstate carrier. Both the ticket and baggage check, as well

[56] The Court went on to say that reasonableness of filed charges could only be attacked in a proceeding before the ICC.

[57] 38 Stat. 1196 (1915), 49 USCA §20(11) (Supp. 1947).

[58] 39 Stat. 441 (1916), 49 USCA §20(11) (Supp. 1947).

[59] *Galveston, H. & S. A. Ry. v. Woodbury*, 254 U.S. 357 (1920) (filed baggage limitation held binding on both carrier and passenger); *American Ry. Express v. Lindenburg*, 260 U.S. 584 (1923) (released value limitations in filed tariff rates binding in shipment of trunks); *American Ry. Express Co. v. Daniel*, 269 U.S. 40 (1925) (shipper bound by provisions of filed tariff rates based upon valuation even though he had no knowledge of rate provisions).

[60] 242 U.S. 148 (1916).

as the filed tariff, contained limitations of liability. Because of faulty certification, the state court refused to admit the filed tariffs in evidence, and full recovery was allowed. In reversing, the Supreme Court stated:[61]

> "In order to determine the liability assumed for baggage it was proper to consider applicable tariff schedules on file with the Interstate Commerce Commission; and the carrier had a Federal right not only to a fair opportunity to put these in evidence, but also that, when before the court, they should be given due consideration."

The foregoing released value cases, while recognizing the binding effect of filed tariff rules, are somewhat weakened by emphasis in the opinions on the relation of rules to rates.[62] This possible distinction between rules closely related to rates and more general rules has not, however, been regarded as significant in the cases dealing with other types of rules. In *Southern Ry. v. Prescott,*[63] an interstate shipment of goods at reduced rates arrived at destination, and the consignee paid the freight charges and removed part of the goods. The remainder of the goods, which was retained by the carrier at the consignee's request and for his convenience, was destroyed by fire. In consideration of the reduced rates, one of the rules contained in the bill of lading and also included in the filed tariff was that property held over 48 hours after notice of arrival would be subject to warehouseman's liability only. The consignee recovered in a state court upon application of more liberal local law on the theory that the interstate transportation had ended. In reversing this judgment, the Supreme Court held that retention of goods was a "terminal service" and therefore a part of interstate transportation within purview of the ICA. Hence, the filed rules could not be departed from. The Court made this comment:[64]

> ". . . It is also clear, that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates [citations omitted] and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act [citing *Kirby* and *Robinson* cases *supra*]. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privilege or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are

---

[61] *Ibid.*

[62] See *Kansas City S. Ry. v. Carl,* 227 U.S. 639 (1913); *Atchison, T. & S. F. Ry. v. Robinson,* 233 U.S. 173 (1914); *Boston & Maine R. R. v. Hooker,* 233 U.S. 97 (1914).

[63] 240 U.S. 632 (1916).

[64] *Ibid.*

> stipulated in the bill of lading under the filed regulations, the parties cannot substitute therefor a special agreement."

Tariff rules providing limitations upon giving notice[65] of loss, damage, or injury have also been enforced by courts as binding upon parties to the contract of carriage. In *Northern Pac. Ry. v. Wall*,[66] the bill of lading, covering an interstate shipment of cattle, provided that in case of damage notice had to be given to the agent of the carrier at destination before the cattle were removed. After delivery by a connecting carrier, a claim for damage was filed with the initial carrier without complying with the notice requirement. Reversing the recovery in the state court, the Supreme Court held that the filed tariff rule was reasonable and binding on the parties, notwithstanding that it was contrary to a Montana statute. Similarly, *Erie R. R. v. Stone*[67] involved a shipment of horses under a livestock contract. Filed tariff rules conditioned liability upon giving notice of damage within 5 days from time of removal from the car. Reasonableness of the rule was left to the jury in the state court, and recovery was allowed. In reversing, the Supreme Court stated that the filed tariff rule was binding on both parties, and it did not have to consider reasonableness of the rule since it had been held reasonable in the *Wall* case.

In *Gooch v. Oregon Short Line R. R.*[68] an action was brought for damages for personal injuries sustained by the plaintiff while riding on a drover's pass, under which the plaintiff agreed not to hold the carrier liable for injuries unless notice of injury was given in writing within 30 days after an accident. The notice requirement was contained in the filed tariff. Plaintiff was injured but failed to give required notice. The Court, in denying recovery although the carrier had actual notice, held the rule to be binding on the parties. And in *Georgia F. & A. Ry. v. Blish Milling Co.*[69] there appears the following dictum concerning a provision of the bill of lading requiring notice of loss to be given within a specified time:[70]

> "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

A filed tariff rule requiring written notice of an order for cars

---

[65] *Northern Pac. Ry. v. Wall*, 241 U.S. 87 (1916); *Erie R. R. v. Stone*, 244 U.S. 332 (1917); *Gooch v. Oregon Short Line R. R.*, 258 U.S. 22 (1922); see *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U.S. 190 (1916). Minimum limitations upon the filing of claims are now contained in Sec. 20(11) of the ICA, as added by the Cummins Amendment and Transportation Act of 1920.

[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.*

[70] *Georgia, F. & A. Ry. v. Blish Milling Co.*, 241 U.S. 190 (1916).

was considered in *Davis v. Henderson*.[71] The shipper brought an action in a state court for damages for the carrier's failure to furnish cars upon oral request and recovered. In reversing, the Supreme Court said:[72]

> "There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation performed was that of a common carrier under published tariffs. The rule was a part of the tariff."

Earlier, reference was made to the case of *Judge v. Northern Pac. Ry.*,[73] as illustrating the early tendency of the courts to disregard the controlling effect of tariff rules. *American Ry. Exp. Co. v. American Trust Co.*,[74] involving a situation similar to that in the *Judge* case, illustrates later acceptance of the principle that tariff rules are conclusive evidence of the terms of the contract of carriage. The plaintiff, a banking house, had over a period of years engaged the services of the express company in making shipments of money and other valuables. The express company had filed a tariff providing that "Packages containing money, bonds, or other securities will be received for transportation only when delivered at the Express Company's office by shippers." The company collected a shipment from the plaintiff in the express company's armored truck at the bank's premises. This conformed to the company's practice over a period of years. En route to the company's office, the money was stolen from the truck and the bank sued for its value. The express company contended that any contract resulting from its practice in violation of the tariff rule was void and no liability could be predicated thereon. The district court[75] held that the contract in violation of the tariff rule was void and unenforceable but allowed recovery on the ground that the company, by accepting the money for transportation, assumed the liability of a common carrier. The court cited with approval the *Judge* case and dictum in *Merchant's Cotton-Press & Storage Co. v. Ins. Co. of North America*.[76] The Circuit Court of Appeals, holding that the tariff rule was binding upon the parties and could not be waived, reversed the district court. The court had this to say:[77]

> "But if, the evidence showed that both appellant's agent and the bank understood that the legal possession of the money passed to the carrier at the bank, and if we further assume that a receipt was given therefor by appellant's driver at the bank door, these facts would not, under the decisions, affect appellant's liability. For the published tariff may not be avoided, enlarged, or varied by the shipper and the carrier through express or implied contract.

---

[71] 266 U.S. 92 (1924). Similarly, a special contract to provide cars at special time is preference contrary to requirement that tariff be adhered to. *Davis v. Cornwell*, 264 U.S. 560 (1924).

[72] *Ibid.*

[73] 189 Fed. 1014 (Ore. 1911).

[74] 47 F. 2d 16 (C. C. A. 7th 1931), *cert denied*, 284 U.S. 629 (1931).

[75] *American Trust Co. v. American Ry. Exp. Co.*, 42 F. 2d 272 (N. D. Ind. 1930).

[76] 151 U.S. 368 (1894).

[77] 47 F. 2d 16, 18 (N. D. Ind. 1930).

> The decisions are clear and explicit. Such tariffs, at least those which are factors in determining the carrier's charges, have the force and effect of statutes . . ."

Two cases involving tariffs of telegraph companies also have an important bearing on this question. In *W. U. Tel. Co. v. Esteve Bros. & Co.*,[78] the telegraph company delivered an unrepeated cable to Esteve Bros., directing the sale of 2,000 bales of cotton. It should have read "200 bales." As a result of the error, Esteve Bros. suffered a loss and sued to recover the amount. Although not required to do so by the ICA at that time, the telegraph company had filed with the ICC its tariff containing a provision that the "company shall not be liable for mistakes . . . in transmission . . . of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to it." The sender did not know that the condition existed. Under Section 1 of the ICA, messages could be classified into "day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates (might) . . . be charged for the different classes of messages." Full damages were recovered in the lower court. The Supreme Court reversed, reducing recovery to the charge ($4.65) paid for transmission of the message in accordance with the tariff rule. The Court stated the question to be "whether since the amendment of June 18, 1910, to the ICA to Regulate Commerce, the sender is, without assent in fact, bound as a matter of law by the provision limiting liability because it is a part of the lawfully established rate." In answering this question in the affirmative, the Court proceeded on the theory that the rate, of which the limitation of liability was an inherent part, was lawfully established in accordance with the ICA, and, therefore, the company was prohibited by Section 3 from granting anyone an undue preference or advantage over the public generally. The Court was careful to point out that the fact that the rates and rules were filed was immaterial, since the result flows, not from the filing, but from the requirements of uniformity and equality. The Court said:[79]

> "The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not, as before, a matter of contract, by which legal liability could be modified, but as a matter of law, by which uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect . . ."

---

[78] 256 U.S. 566 (1921).
[79] *Ibid.*

In *W. U. Tel. Co. v. Priester*,[80] the Alabama court had disregarded a limitation of liability included in the company's filed tariff on the theory that the company had been guilty of gross negligence. In reversing, the Supreme Court said:[81]

> ". . . The established rates for unrepeated messages thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent . . . What had previously been a matter of common law liability, with such contractual restrictions as the states might permit, then became the subject of Federal legislation to secure reasonble and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon authorized classification, that rate 'represents the whole duty and the whole liability of the company . . ."

The ICC, in response to a request to waive the four-month limitation on presentation of claims by the shipper contained in tariffs, gave recognition to the controlling effect of the filed tariff rule when it stated that it had no authority to disregard the tariff rule. In *re Bills of Lading*[82] it made the following comment:

> ". . . When it becomes apparent to carriers that they cannot, ought not, or will not enforce the provisions contained in their established tariffs, whether in regard to matters of the kind here involved, demurrage, reconsignment, or other like practices, as well as to rates, they should change the tariffs in the manner prescribed by law so that their practices may be in conformity thereto. . . ."

While, as we have seen, later cases arising under Part I of the ICA have generally recognized that terms of a contract of carriage are to be determined solely by reference to the filed tariffs,[83] the rule has not re-

---

[80] 276 U.S. 252 (1928).

[81] *Ibid.*

[82] 29 ICC 417, 419 (1914).

[83] The state courts in the various jurisdictions in cases arising under the ICA have also, in general, held the filed tariff solely determinative of the terms of the contract of carriage. *Atchison, T. & S. F. Ry. v. Stannard*, 162 Pac. 1176 (Kan., 1917); *Am. Ry. Exp. Co. v. Mohawk Dairy Co.*, 144 N. E. 721 (Mass., 1924); *Penna. R. R. v. Marcelletti*, 240 N. W. 4 (Mich., 1932); *Minn., St. P.&S. St. M. Ry. v. Reeves Coal Co.*, 181 N. W. 335 (Minn., 1921); *Foster Lbr. Co. v. Atchison, T. & S. F. Ry.*, 194 S. W. 281 (Mo., 1917); *Wall v. Northern P. Ry.*, 161 Pac. 511 (Mont., 1916); *Dolan Fruit Co. v. Davis*, 196 N. W. 168 (Neb., 1923); *Penna. R. R. v. Titus*, 109 N. E. 857 (N. Y., 1915); *Cent. R. R. of N. J. v. Mauser*, 88 Atl. 791 (Pa., 1913); *Pacific Fruit & Produce Co. v. Northern Pac. Ry.*, 186 Pac. 852 (Wash., 1920); Notes, 49 L. R. A. (N. S.) 92, 83 A. L. R. 245. Similar treatment has been accorded tariffs filed under the MCA. *Artic Roofings, Inc. v. Travers*, 32 A. 2d 559 (Del., 1943); *Jackson & Perkins Co. v. Mushroom Transp. Co., Inc.*, 41 A. 2d 635 (Pa., 1945), *cert. denied*, 326 U.S. 733, 90 L. Ed. 437 (1945). And, generally, the same result has been reached with respect to intrastate tariffs filed pursuant to state regulatory statutes. *Emerson v. Central of Ga. Ry.*, 72 So. 120 (Ala., 1916); *Cleveland, C., C. & St. L. R. R. v. Alexandria Paper Co.*, 124 N. E. 402 (Ind., 1919); *Jackson & Crawford v. Chi., B. & Q. Ry.*, 238 N. W. 911 (Iowa, 1931); *Cummings Sand & Gravel Co. v. Minn. & St. L. R. R.*, 166 N. W. 354 (Iowa, 1918); *Mollohan v. Atchison, T. & S. F. Ry.*, 154 Pac. 248 (Kan., 1916); *C. & O. Ry. v. Maysville Brick Co.*, 116 S. W. 1183 (Ky., 1909); *Mellon v. Stockton & Lampkin*, 35 S. W. 2d 612 (Mo., 1931); *Chi. & N. W. Ry. v. Queenan*, 167 N. W. 410 (Neb., 1918); *Haurigan v. Chi. & N. W. Ry.*, 117 N. W. 100 (Neb., 1908); *Appalachian Electric Power Co. v. Virginian Ry.*, 29 S. E. 2d 471 (W. Va., 1944); Note, 83 A. L. R. 245, 261. *Contra*: *Mason v. Maine C. R. R.*, 110 Atl. 425 (Me., 1920); *Ferris v. Minn. & St. L. Ry.*, 173 N. W. 178 (Minn., 1919); *Wall-A-Hee v. Northern P. Ry.*, 41 P. 2d 786 (Wash., 1935).

ceived unanimous judicial approval and application. In *Pacific S. S. Co. v. Cackette,*[84] the plaintiff purchased and signed a ticket, sold subject to all conditions of the lawfully published tariff. The tariff, filed with the California Ry. Board, U.S. Shipping Board and the ICC, contained a rule that all claims for loss or damage should be presented in writing within 10 days of landing. The plaintiff was assaulted by an employee of defendant and brought an action for damages 10 months later without giving the required notice. On appeal from a judgment allowing recovery, the only question was whether the cause of action was barred under the tariff rule. The court affirmed, basing its decision on the ground that the ICA contained no provision relating to rights of action against carriers for assault or negligence, and that notice of such claims has no perceptible relation to the charges for transportation. The court recognized that the passenger was chargeable with notice of the tariff, which became a part of the contract of transportation [citing the *Harriman* and *Hooker* cases], but distinguished the cases supporting the rule on the ground that in those cases limitations were required to be filed in the tariffs. It reasoned that a passenger or shipper was not chargeable with notice of any rule not contemplated or required by the ICA.[85]

The Supreme Court in *Boston & M. R. Co. v. Piper,*[86] in a decision which is difficult to explain, departed from its general acceptance of the rule. That case involved an action for damages resulting from delay in a cattle shipment. The cattle were shipped at reduced rates under a bill of lading filed with the tariffs. The bill of lading contained a provision that in case of unusual delay caused by carrier's negligence, recovery would be limited to actual cost of feed and water with an option of a higher recovery upon the payment of higher rates. The Court held that this was not a valid limitation on the amount of recovery, but an attempt to exonerate the carrier from liability for its negligence by a contract which left practically no recovery for damages and was therefore void. The Court stated that:[87] "The legal conditions and limitations in the carrier's bill of lading are binding until changed by that body . . .; but not so of conditions and limitations which are, as is this one, illegal, and consequently void." This instance of a court disregarding the binding effect of the tariff provision under its own conception of "illegality" would appear to be an exception to the general rule.

The doctrine developed under Part I of the ICA has also been applied to tariffs under the Communications Act of 1934.[88] *Ambassador, Inc. v. U.S.,*[89] was an appeal from a decree enjoining defendant hotels from charging guests more than the toll charges of the Telephone Com-

[84] 8 F. 2d 259 (C. C. A. 9th 1925), *cert. denied,* 269 U.S. 586 (1926).
[85] *Cf. Gooch v. Oregon Short Line R. R.,* 258 U.S. 22 (1922).
[86] 246 U.S. 439 (1918).
[87] *Ibid.*
[88] 48 Stat. 1064, 47 USCA §151 (Supp. 1947).
[89] 325 U.S. 317 (1945).

pany in connection with interstate or foreign telephone calls. The Telephone Company had filed a tariff with the Federal Communications Commission (FCC) which provided: "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members, or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff." The tariff had been filed pursuant to an order of the FCC requiring the Telephone Company either to file tariffs covering such charges, or to issue tariff regulation specifying conditions under which such service would be furnished to hotels. The Court affirmed the injunction on the ground that the Communications Act authorized filing of regulations governing the service, and, since the tariff rule in question clearly affected the service, it was binding on subscribers.

Decision Under the Civil Aeronautics Act

In the one reported case in which the question has been squarely presented whether a tariff filed under the Civil Aeronautics Act is conclusive as to the terms of contract, the court reached a result consistent with that developed under earlier regulatory statutes. In *Jones v. Northwest Airlines, Inc.*,[90] the plaintiff had purchased a round-trip ticket from Seattle to Washington, D. C. He explained to the ticket agent that he had a limited time in which to make the trip, and was told that he could probably do it all right. The ticket bore the legend, "Sold subject to tariff regulations." The plaintiff's flight was cancelled en route because of weather, and he was offered the next available reservation. His demand for a seat on the next plane having been refused, he returned to Seattle without completing the trip. In his action for breach of contract, he alleged that the contract of carriage was made on the basis of the time element involved and that he was, therefore, entitled to a seat on the next plane after his flight had been cancelled. The applicable tariff on file with the CAB provided that the carrier could cancel any flight at any time it deemed such action advisable or necessary, and that the carrier would not be responsible for its failure to arrive or depart on schedule. In affirming a decision by the trial court that there had been no breach of contract, the Supreme Court of Washington pointed out that the plaintiff purchased the ticket subject to the tariff provisions, and that the carrier was prohibited from departing from them by the Act.[91]

---

[90] 157 Pac. 2d 728 (Wash. 1945); commented on in Orr, *The Law Affecting Aviation Liability*, 20 Temple L. Q. 64 (1946):

"The significance of the above decision is that it is the first we have had upholding the legality of the rules and regulations filed by all airlines with the CAB and hence applying the great volume of law already decided in connection with the filing of like tariffs by railroads and other surface carriers with the ICC. This includes the limitation of liability on checked baggage and other property—a subject of increasing interest as air travel increases."

[91] By way of dictum, the court added that had the provisions been attacked as unreasonable, it would not have had jurisdiction, since that was a question to be passed upon by the CAB in the first instance.

While there have been occasional deviations from the rule as developed under earlier regulatory acts, it seems clear, both on principle and authority, that a tariff filed under the Act is conclusive evidence of terms of the contract of carriage. No other conclusion would be consistent either with the express provisions of the Act or with its objectives.

A carrier subject to the Act is required to publish and file tariffs containing its rates and rules. These, then, taken together, constitute the terms of its offer to serve the public. The Act expressly prohibits the carrier from deviating from those terms; departure is punishable as a criminal offense. To be sure, the Act does not explicitly say that the other party to the contract – the passenger or shipper – is similarly restricted. But the restriction upon his freedom to contract follows as a matter of course. If the carrier is legally free to agree only to terms published in its tariff and no others, there can hardly be a "meeting of the minds" on other contractual terms, even though the passenger or shipper retains complete freedom. The tariff, then, contains the only terms upon which the parties can legally agree. It contains the carrier's offer, which the passenger or shipper accepts when he uses the carrier's service. It *is* the contract of carriage.

It might conceivably be argued that, in spite of the prohibition against deviation from its tariff, the carrier retains legal capacity to enter into a binding contract including terms not specified in its tariff, and that the tariff, therefore, is not conclusive evidence of the terms of the contract. It is certainly true that a criminal statute does not destroy capacity of the criminal to violate the statute. But whether the rationale is lack of legal capacity to enter into a contract deviating from the tariff, or whether we regard such a contract as unlawful and therefore unenforceable, the fact remains that the purposes of the Act cannot be achieved if effect is given to such a contract. It will be recalled that the primary purpose of the tariff-filing requirement was to prevent discrimination. To recognize as valid and enforceable a contract deviating from the tariff would defeat that objective of the Act. It would be giving effect to a discrimination. Only by refusing to recognize such a contract as valid and by refusing to enforce it can the objectives of the Act be achieved.

It seems clear, also, that whether either a tariff rate or a rule related directly or remotely, or not at all, to the rate is involved, the result must be the same. No sound basis for distinction exists. The degree of discrimination might vary, but the fact of discrimination remains. The principles involved apply equally in each case.

Can Provisions of a Tariff Filed Under the Civil Aeronautics Act Be Avoided or Invalidated Retroactively?

If, as we have concluded, the filed tariff is conclusive evidence of terms of the contract of carriage, the question arises whether a passen-

ger or shipper, having become a party to the contract, may avoid its provisions on the ground that they are unlawful. May he, for example, after receiving transportation, attack the tariff rate as unreasonable and recover as damages the excess over the lawful rate? May he escape the effect of a tariff rule limiting the carrier's liability on the ground that it is invalid? In the case of ordinary contracts, of course, a party can obtain relief from provisions which are illegal or otherwise contrary to public policy.[92] Is this principle applicable to a contract of carriage embodied in a tariff filed pursuant to the Act?

Essentially, the question is whether particular remedies are available to enforce a statutory duty of the carrier. The Act, as we have seen, imposes an affirmative duty on carriers to publish lawful tariff rates and rules, i. e., rates and rules which are "just and reasonable" [93] and which do not result in "any undue or unreasonable preference or advantage" or in "any unjust discrimination or any undue or unreasonable prejudice or disadvantage." [94] To insure performance of this duty, the Act provides an elaborate system of safeguards and remedies. The CAB may, through the exercise of its suspension powers, prevent an unlawful rate or rule from taking effect.[95] Even after the unlawful provision has become effective, the Board may take corrective action and require the carrier to substitute a lawful provision.[96] The carrier may be subject to criminal penalties for willful disregard of its statutory duty.[97] Our problem is to determine whether or not, in addition to these remedies, the Act permits a passenger or shipper to attack the validity of a tariff provision in order to establish a common-law right of action against the carrier or deprive the carrier of a defense based on the terms of the tariff. Was this remedy provided as additional insurance against breaches of the carriers' statutory duty?

While the problem is one which might be attacked from several different quarters, perhaps the most direct approach is to inquire whether the CAB has power to pass upon lawfulness of a filed tariff provision retroactively. If not, can the courts exercise such a power? Obviously, if no judicial or quasi-judicial power exists to declare a tariff provision invalid retroactively, the provision is immune from such an attack. On the other hand, if the power exists, presumably it can be exercised in appropriate cases. Let us examine first the powers of the CAB.

Retroactive Power in Administrative Agencies

Since the CAB is a creature of statute, its powers are derived solely from statute. Hence we must look to provisions of the Act to determine whether power to declare tariff provisions unlawful retroactively

[92] Williston, Contracts, §1628 *et seq.* (Rev. Ed.).
[93] Sec. 404(a); 52 Stat. 993, 49 USCA§484(a) (Supp. 1947).
[94] Sec. 404(b).
[95] Sec. 1002(g).
[96] Sec. 1002(d).
[97] Sec. 902(a) and (d).

has been conferred upon the Board. If such a power has not been expressly granted by, or cannot be reasonably implied from, the Act, then no such power exists.

Nowhere in the Act is there an express grant of power to the Board to invalidate tariff provisions retroactively. The only power to change tariff provisions expressly conferred on the Board is to be exercised prospectively. If the Board is of the opinion that a tariff provision "is or will be" unlawful, it is to determine and prescribe the lawful rate "thereafter" to be charged or the lawful rule "thereafter" to be made effective.[98] The finding that a tariff provision "is or will be" unlawful looks to the present and future. The prescription of a lawful rate or rule "thereafter" to become effective looks only to the future. The lawfulness of the rate or rule at some time in the past is not presented as a subject either for determination by the Board or for remedial action.

Absent any express grant of authority to the Board to determine the lawfulness of tariff provisions retroactively, can such a power be implied from provisions of the Act? The express grant of a limited power is persuasive evidence that Congress did not intend to confer a broader or unlimited power. Precision in statutory drafting cannot be regarded as unintentional. Hence, the express grant of a power to invalidate tariff provisions prospectively not only militates strongly against implying a power to invalidate them retroactively, but, on the contrary, also suggests that the power was deliberately withheld.

This conclusion finds potent support in a comparison of the Act and Part I of the ICA, which had been passed approximately fifty years previously and which, in many respects, served as a model for the later Act. It is highly significant that at the time the Act was adopted, Part I of the ICA, relating to rail carriers, made specific provision for civil liability for damages sustained by anyone as a consequence of a violation of any provision of that Part.[99] The person claiming damages might either complain to the ICC or bring suit in a district court of the United States;[100] and the ICC was expressly granted authority to make an award of reparations.[101] From its inception, the ICC had been expressly granted reparation powers, and the Act had been amended

[98] Sec. 1002(d).

[99] Sec. 8; 24 Stat. 382 (1887), 49 USCA §8 (Supp. 1947).

[100] Sec. 9; 24 Stat. 382 (1887), 49 USCA §9 (Supp. 1947).

[101] Sec. 16; 34 Stat. 590 (1906), 49 USCA §16 (Supp. 1947). Originally, reparation orders of the ICC were enforceable only in equity, and the ICC assumed the position that it was precluded from considering the question of assessment of damages since no jury trial was afforded. *Council v. Western & Atl. R. R.*, 1 ICC 339 (1887); *Heck & Petree v. E. Tenn., Va. & Ga. R. R.*, 1 ICC 495 (1888); *Riddle, Dean & Co. v. N. Y., L. E. & W. R. R.*, 1 ICC 594 (1888). This defect was cured by an amendment of March 2, 1889 (25 Stat. 859), providing a summary proceeding for enforcement of the ICC's orders in federal courts; but the ICC continued to assume the attitude that the assessment of damages was peculiarly suitable for jury trial until forced to abandon its position in the face of decisions in federal courts that if the complainant elected to proceed before the ICC and received no award of damages, he could not subsequently pursue his remedy at law. See 5 ANNUAL REP. OF ICC 10 (1891); *Macloon v. Chi. & N. Ry.*, 5 ICC 84 (1892).

from time to time to increase the effectiveness of that remedy. Surely, when Congress enacted the Civil Aeronautics Act it was fully cognizant of the existence of the reparation powers of the ICC, and knew that the ICC, in exercising those powers, had been passing upon the validity of tariff provisions retroactively for the prior half-century. Under those circumstances, Congress' failure to follow the example of Part I of the ICA on such an important point implies a deliberate departure, and a decision to rely upon other sanctions and remedies to insure performance of the carriers' statutory duties.

If omission of reparation powers from the Act were an isolated instance, contrary to a uniform regulatory formula prescribed for other types of carriers, it might conceivably be argued that the omission was an oversight, and that the power of the CAB to invalidate tariff provisions retroactively should be implied, so as to give effect to a well-established Congressional pattern. But that is not the case. When Congress enacted the Motor Carrier Act (MCA) [102] in 1935, it omitted any provision imposing liability for civil damages for violations of the Act and made no express grant of reparation powers to the ICC. Yet, five years later, when Part III [103] (relating to water carriers) was added to the ICA, Congress reverted to the pattern of Part I and provided civil liability for damages resulting from violations of that Part and expressly granted reparation powers to the ICC.[104] But, only two years later when Part IV [105] was added to regulate freight forwarders, no mention was made of reparation authority. Similarly, in the field of shipping,[106] packers and stockyards,[107] and communications,[108] the regulatory statutes expressly include reparation authority; but with respect to the regulation of natural gas,[109] no reparation power was expressly granted. These variations in the regulatory pattern established for the different types of utilities can hardly be explained as the result of oversight or accident. On the contrary, they constitute indisputable evidence of deliberate inclusion in some cases and exclusion in others.

The conclusion seems clear. Congress was presented with a choice between including or excluding a grant of reparations power in the Act. It had granted the power to the ICC in the case of rail carriers, but withheld it in the case of motor carriers. It had exercised a similar election in the case of other regulatory statutes. It elected not to grant such powers to the CAB, but, instead, granted the limited power to modify tariff provisions prospectively. The most reasonable, if not the only reasonable, inference is that no power to

[102] 49 Stat. 543, 49 USCA §301 (Supp. 1947), now Part II of the ICA.
[103] 54 Stat. 929, 49 USCA §901 (Supp. 1947).
[104] Sec. 308; 54 Stat. 940, 49 USCA §908 (Supp. 1947).
[105] 56 Stat. 284 (1942), 49 USCA §1001 (Supp. 1947).
[106] SHIPPING ACT OF 1916, 39 Stat. 736 (1916), 46 USCA §821 (1940).
[107] PACKERS AND STOCKYARDS ACT, 1921, 42 Stat. 165 (1921), 7 USCA §308 (1940).
[108] COMMUNICATIONS ACT OF 1934, 48 Stat. 1072 (1934), 47 USCA §206 (1940).
[109] NATURAL GAS ACT, 52 Stat. 821 (1938), 15 USCA §717 (1940).

invalidate them retroactively was conferred on the Board.[110]

While the foregoing conclusion has not been judicially confirmed, it finds support in the construction placed by the courts on statutes similar to the Act. In *Hope Natural Gas Company v. Federal Power Commission*,[111] the Federal Power Commission (FPC), conceding the lack of any reparation power under the Natural Gas Act, asserted its authority in aid of state regulation to make a finding as to past lawfulness of rates.[112] The Natural Gas Act also conferred on the FPC express power to modify rates prospectively,[113] but conferred no power to invalidate rates retroactively. The Circuit Court of Appeals reversed the FPC's order on the ground that, in the absence of an express grant of such authority, none existed. The Supreme Court, while not passing upon the question of the FPC's power, reversed on the ground that the court had no jurisdiction to review the FPC's order under judicial review provisions of the Natural Gas Act[114] until some further action had been taken under the order. Although the order had been mistakenly reviewed, the opinion of the Circuit Court of Appeals is not without value:[115]

> "The fundamental difference between quasi-legislative and quasi-judicial power is that the one is concerned primarily with prescribing regulations for the future, the other with determining rights in the light of what has occurred in the past. . . . The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i. e., regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any

---

110 Recourse to legislative history of the MCA and the Civil Aeronautics Act fails to disclose any information as to reasons for the different treatment when the acts were passed. The ICC has recently recommended that motor carriers, some water carriers (not presently liable), and freight forwarders be made liable for damage resulting from violations of the act, and subject to reparation orders. See ANNUAL REP. OF ICC, 118 (1945); 122 (1946); 148 (1947). In supporting a pending bill in Congress which would accomplish that recommendation, the Legislative Committee of the ICC in commenting on the omission of reparation power from Part II of the ICA pointed out that at the time of its enactment it was believed that conditions in motor transportation were not stabilized and the subjection of motor carriers to liability for damages should be deferred until problems under the new regulations had been solved. After twelve years of experience under the regulations it is now believed that conditions justify addition of the reparation remedy for the benefit of the shipper. *Hearings before Committee on Interstate and Foreign Commerce on H. R.* 2324 *and H. R.* 2295, 80th Cong., 1st Sess. 5 (1947).

111 134 F. 2d 287 (C. C. A. 4th 1943).

112 52 Stat. 821, 15 USCA §717 (Supp. 1947).

113 Sec. 5(a); 52 Stat. 823, 15 USCA §717(d) (Supp. 1947).

114 *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

115 *Hope Natural Gas Co. v. F. P. C.*, 134 F. 2d 287, 309 (C. C. A. 4th 1943).

> such unusual power in a commission ought to be indulged unless conferred in the plainest terms; and not only is it not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar." (Citations omitted.)

A number of state courts construing state statutes have reached a similar conclusion. The regulatory scheme of the ICA has been widely followed in the statutes regulating intrastate carriers. However, many state acts, like the Civil Aeronautics Act, expressly grant authority to state boards or commissions to prescribe tariff provisions or to change them prospectively, but are silent as to any power to invalidate provisions retroactively. These statutes have generally been construed as conferring no jurisdiction on regulatory boards or commissions to invalidate tariff provisions retroactively.[116]

The question was presented under the New York statute in *Murphy v. New York C. R.R.*,[117] involving an action to recover track storage charges paid under a filed tariff. The claim was based on a resolution of the State Commission that the charges were unreasonable. The statute contained an express grant of power to change tariff provisions prospectively, but contained no reparation authority. In reversing a recovery in the lower court, it was pointed out that the statute conferred no jurisdiction on the Commission to pass upon rates retroactively:[118]

> "The action at bar asserts the doctrine that the Public Service Commission is empowered to determine that a rate or charge for intrastate transportation, duly scheduled and filed with it, has been, through a period of years during which it has been filed and paid, and is, unreasonable and unjust, that the payor is entitled to recover from the carrier the excess fixed by the Commission beyond the reasonable charge, and that the determination of the Commission is prima facie proof in the courts of the state of the facts determined. We cannot discern in the statute such legislative intent."

In *Great Western Portland Cement Co. v. Public Service Commission*,[119] a complaint charging that railroad rates applicable in the past were unreasonable and requesting a determination by the Commission of rates that would have been reasonable had been filed with the state Commission. Upon refusal of the Commission to make the determination for lack of jurisdiction, the complainant obtained a writ of mandamus to compel such action. On appeal, the mandamus order was reversed. The Court held that the statute neither expressly nor by fair interpretation conferred power on the Commission to make findings as to reasonableness of rates previously charged.

A similar result was reached under the Virginia Statute.[120] An

---

[116] Note, 97 A. L. R. 406 (1935).
[117] 122 N. E. 700 (N. Y., 1919).
[118] *Id.* at 701.
[119] 127 Pac. 881 (Kan. 1926).
[120] *Mathieson Alkali Works v. N. & W. Ry.*, 137 S. E. 608 (Va., 1927).

action in assumpsit was brought to recover overcharges. The rates charged had been in accordance with a tariff filed after a general order of the Commission granting increases. Upon a later finding that the rates were unreasonable at certain destination points, the Commission had corrected them; and the question presented was whether this finding had retroactive effect in the absence of an express grant of reparation powers. The Court held that the rates were conclusively presumed to be reasonable as long as they remained in effect, and that the Commission had no power to invalidate them retroactively. In reaching that conclusion the Court in part relied on the fact that, unlike the ICA, the Virginia statute contained no express grant of reparation powers. The Court made the following observation:[121]

> "The omission to specifically confer the power on the State Corporation Commission to declare a legally established rate unreasonable retroactively and to award reparation is significant, in view of the fact that the Federal Act was before the constitutional convention and the legislature when the Constitution was adopted and the corporation statutes were enacted, and many of its provisions were adopted. An intentional omission, under the circumstances, seems clear." [122]

The Montana Court, in *Montana Horse Products Co. v. Great Northern Ry.*[123] and *Sunburst Oil & Refining Co. v. Great Northern Ry.*,[124] considered the power of the State Commission to pass upon the reasonableness of rates previously prescribed or approved by it and held that since there was no express grant of reparation powers in the statute, rates prescribed by the Commission were presumed to be reasonable as long as they remained in effect and could not be declared unreasonable retroactively.[125] In the *Sunburst* case the Court said:[126]

> "Since the finding by the commission as to the unreasonableness of the rate because of the difference between the actual and the estimated weights of the oil operated prospectively only, and the only lawful tariff which could be exacted by the carrier was that which was at the time prescribed in its published tariff as fixed by the Commission, it is apparent that the plaintiff is not entitled to damages by way of reparations. Common-law rights of the shipper are superseded by the statute.
>
> "Under our statutes, so long as the rates established by the

---

[121] *Id.* at 775.

[122] When the question was later presented to the Virginia Court, it again reviewed the statute and found that, in view of provisions expressly granting the ICC prospective powers to change tariff provisions and the absence of any grant of reparation powers, no power to change tariff provisions retroactively could be implied. *Commonwealth ex rel. Appalachia v. Old Dominion Power Co., Inc.*, 34 S. E. 2d 364 (Va., 1945).

[123] 7 P. 2d 919 (Mont., 1932).

[124] 7 P. 2d 927 (Mont., 1932).

[125] The holding was made applicable for the future, since the court felt compelled to follow an earlier precedent reaching an opposite result. This aspect of the case was affirmed in *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 77 L. Ed. 360 (1932), as not depriving the carrier of property without due process.

[126] 7 P. 2d 927, 929 (Mont., 1932).

> Commission are in force, they are presumed to be reasonable, and neither the commission nor the courts have power to retroactively declare such established rates unreasonable and then permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier."

In the *Montana Horse Products* case, the Court pointed out the error of a former decision[127] in which it held that a court had no jurisdiction to award damages based upon unreasonableness of rates until the Commission had made such a finding, and that the Commission's lack of authority to award reparations did not preclude its making a finding of unreasonableness which could serve as the basis of a common-law action. The Court said that without reparation authority, the Commission's jurisdiction did not include power to determine validity of tariff rates retroactively, and, therefore, the previous decision could not be reconciled with the statute.

These cases illustrate the position that has generally been adopted in construing state statutes which expressly grant regulatory commissions power to prescribe or change tariff provisions prospectively, but omit any reparation power.[128] No power on the part of the commission to determine validity of tariff provisions retroactively has been implied under such circumstances. On the contrary, the express grant of a power to be exercised prospectively, coupled with omission of any authority to make retroactive determinations, has been regarded as clear evidence that the latter authority was deliberately withheld.

While, as we have seen, there is ample support, both in principle and authority, for the conclusion that the CAB has no authority to make retroactive determinations of the validity of tariff provisions

---

[127] *Doney v. Northern P. Ry.*, 199 Pac. 432 (Mont., 1921).

[128] *Miller Mill Co. v. L. & N. R. R.*, 92 So. 797 (Ala., 1922); *Texas & P. Ry. v. Railroad Comm. of La.*, 69 So. 837 (La., 1915); *U.S. Steel Corp. v. Pa. R. R.*, P. U. R. 1920 E, 142 (Ohio P. U. C.); *Toledo Sugar Co. v. Cinn. N. R. R.*, P. U. R. 1921 E, 737 (Ohio P. U. C.); *Leroy Springs v. Duke Power Co.*, P. U. R. 1931 D, 9 (S. C. R. R. Comm.). The Texas statute, in the absence of an express reparation power, has been construed as limiting the commission's jurisdiction to prospective control over tariff rates, but jurisdiction is granted to courts to pass upon reasonableness of rates. See *Houston Chamber of Commerce v. Railroad Comm. of Texas*, 19 S. W. 2d 583 (Tex. Civ. App., 1929); *Missouri-Kansas & T. R. R. v. Railroad Comm. of Texas*, 3 S. W. 2d 488 (Tex. Civ. App., 1928).

In most of the cases construing state acts, courts in denying any implication under the statutes of power in the commission to invalidate tariff provisions retroactively placed much emphasis on the fact that rates were commission-made as distinguished from carrier-made rates under Part I of the ICA, which made them legislative in nature. The appraisal of the distinction in a case which arose under the New Mexico statute is interesting. *Kemp Lbr. Co. v. A. T. & S. F. Ry.*, 9 P. 2d 387 (N. M., 1932). There an action was brought to recover overcharges based on the difference between the rate as finally fixed by the SC and the rate which had been established by the carrier within the maxima previously set by the legislature and charged from the time of complaint. The contention was made that a right of action survived since the rates were carrier-made under the New Mexico law as distinguished from the scheme of commission-made rates in other states. The court, however, refused to regard the distinction as significant, since the carrier-initiated rates, if permitted to remain unchanged, became in effect commission-made rates. Observing that the statute provided no reparation power, the court stated that the commission's control over rates was solely legislative, to which the common law remedy must give way.

filed with it in accordance with the Civil Aeronautics Act, the path to that conclusion is not without obstacles. One obstacle was created by a case invoking the so-called primary jurisdiction doctrine. In that case involving the validity of a tariff provision filed under the Act, the court held that the CAB had primary jurisdiction to determine such issues. *Adler v. Chicago & Southern Airlines, Inc.*[129] was an action brought against an airline for damages allegedly resulting from cancellation of a scheduled flight. On motion of the defendant, the court dismissed the action on the ground that the practice of cancelling flights was a "practice" within the meaning of the Act, and that the court was without jurisdiction to grant relief until either the CAB found that the practice complained of was unlawful or the plaintiff had exhausted his remedies before the Board.[130] The decision is clearly at odds with the conclusion suggested above, for it assumes that the Board has jurisdiction to pass upon lawfulness of the practice retroactively. And it seems to assume also that the plaintiff's remedies before the Board not necessarily would be limited to a prospective change in the tariff rule covering the complained-of practice. The case therefore requires further attention.

In reaching its conclusion that the primary jurisdiction doctrine applied, the court in the *Adler* case relied upon the precedents established under Part I of the ICA. The doctrine has its origin in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*[131] where it was held that a shipper could not sue a rail carrier to obtain redress for being charged an unreasonable rate, prior to a determination by the ICC that the rate was unreasonable. The doctrine was regarded as essential to preservation of the regulatory system created by Part I of the ICA and to the effectuation of its purposes. Although the ICA itself provided access to federal courts for a passenger or shipper who had been injured by a carrier's breach of statutory duties, it was recognized that uniformity of treatment—which was one of the major purposes of the ICA—could never be achieved if validity of tariff rates and rules was to be tested by divergent standards of different courts

[129] 41 F. Supp. 366 (E. D. Mo. 1941).

[130] In a subsequent proceeding before the CAB the jurisdiction of the Board to pass upon lawfulness of the practice was not questioned. The complaint did not allege any specific unlawful, unreasonable or improper practice, and it was dismissed since, after investigation, the Board found no failure by the carrier to comply with the provisions of the Act and that the practice was not unjust or unreasonable. 4 CAB 113 (1943). In *Schwartzman v. United Air Lines*, 6 FRD 517 (D. C. Neb. 1947), an action, similar to that in the *Adler* case, was brought to recover damages for failure of the airline to transport the plaintiff, after purchase of a ticket and reservation of space, and for return of the purchase price of the ticket. A motion was made to dismiss on grounds that the CAB had primary jurisdiction of the question and that the plaintiff had failed to exhaust his remedies before the Board. The motion was denied, since at that stage of the pleadings no question had been presented which was within the statutory jurisdiction of the Board, but without prejudice to a renewal of the motion if an issue within the jurisdiction of the Board were later raised by the pleadings. The court disagreed with the conclusion reached in the *Adler* case that the single act of cancellation constituted a "practice" within the Act on basis of the facts reported in the opinion in that case.

[131] 204 U.S. 426 (1907).

and juries. Only by centralizing responsibility for making such decisions could consistent results be expected and desired uniformity achieved. The primary jurisdiction doctrine, therefore, was a prerequisite to proper administration of Part I of the ICA and attainment of its major objectives. Consequently, the doctrine was consistently applied in cases involving validity of tariff rates[132] or rules[133] under Part I of the ICA.

It should be recalled that the primary jurisdiction doctrine had its origin under a statute which expressly granted power to the ICC to award reparations. As long as the doctrine is applied under such a statute, there can be no question concerning the soundness of the assumption of administrative jurisdiction underlying the doctrine. But when the doctrine is transplanted into a field where the regulatory statute grants no such authority, the assumption underlying the doctrine falls—and the doctrine with it. An administrative agency which has *no* jurisdiction to make retroactive determinations of the validity of tariff provisions certainly cannot have *primary* jurisdiction to do so; and courts, by blind invocation of the doctrine, cannot confer jurisdiction which the statute withheld. Thus, if the jurisdiction exists, it must be derived from the statute, not from a doctrine of judicial self-limitation.

Examination of the opinion in the *Adler* case reveals that the court relied upon precedents under Part I of the ICA and the Shipping Act, in which the doctrine had been applied, and upon the general similarity of regulatory patterns created by those Acts, on the one hand, and the Civil Aeronautics Act, on the other. It neither made any detailed examination (so far as the opinion indicates) of provisions the Act, nor did it mention the significant differences between Part I of the ICA and the Civil Aeronautics Act which have been previously noted. Under those circumstances, it is difficult to believe that the court, fully aware of the problem, construed the Civil Aeronautics Act as conferring, by implication, authority on the CAB to determine retroactively validity of the practice in issue. It seems more likely that precedents under other Acts and the general similarity of those Acts to the Civil Aeronautics Act were accepted by the court uncritically, and that the assumption of adequate jurisdiction in the Board was not questioned.

But whatever the explanation of the court's decision, it is believed to be unsound. As already indicated, there are convincing reasons for the conclusion that the Civil Aeronautics Act did not confer on the CAB power to determine retroactively the validity of tariff provisions. If such power exists, it must be implied in the Act, and any such implication is defeated by considerations outlined above. Certainly,

[132] *Texas & P. Ry. v. Cisco Oil Mill*, 204 U.S. 449 (1907); *Southern Ry. v. Tift*, 206 U.S. 428 (1907); *Mitchell Coal & Coke Co. v. Penna. R. R.*, 230 U.S. 247 (1913).

[133] *Morrisdale Coal Co. v. Penna. R. R.*, 230 U.S. 304 (1913); *Midland Valley R. R. v. Barkley*, 276 U.S. 482 (1928).

the reasoning of the *Adler* decision does not furnish a convincing answer to those arguments. On the contrary, the opinion in the *Montana Horse Products* case[134] seems to furnish a more than adequate answer to the *Adler* decision.

A second obstacle to the conclusion that the CAB does not have power to invalidate tariff provisions retroactively is the position which the ICC has taken under the MCA. Although the pertinent provisions of that Act closely parallel the provisions of the Civil Aeronautics Act,[135] the ICC has held that it has implied power to pass upon lawfulness of rates involved in past transactions, even though it does not have express authority to grant reparations.[136] The leading case[137] in which the Commission asserted its authority involved a complaint against lawfulness of rates charged on past shipments of potato chips. The Commission found the rates to be unreasonable both for the past and the future. While admitting that it had no power to grant reparations for past unlawful charges, the Commission felt that its determination of unlawfulness could form the basis for an action for damages in court. The Commission relied upon its general powers under the MCA to enforce the Act,[138] and more specifically upon its power, upon complaint or its own initiative, to investigate and determine whether a motor carrier has complied with the provisions of the Act and to make necessary orders to obtain compliance.[139] The Commission reasoned that since the duty of establishing just and reasonable rates was imposed on carriers, and unjust and unreasonable charges were prohibited and made unlaw-

---

[134] *Montana Horse Products Co. v. Great Northern Ry.*, 7 P. 2d 919 (Mont., 1932).

[135] Sec. 204(a)(6); 52 Stat. 1237, 49 USCA §304(a)(6) (Supp. 1947); Sec. 204(c); 54 Stat. 922, 49 USCA §304(c) (Supp. 1947); Sec. 216(a), (b), (d) and (e); 49 Stat. 558 (1935), 52 Stat. 1240 (1938), 54 Stat. 924, 49 USCA §316(a), (b), (d) and (e) (Supp. 1947); Sec. 217; 49 Stat. 560 (1935), 54 Stat. 925, 49 USCA §317 (Supp. 1947).

[136] Statements of the conclusion of the commissions in this respect appear in *Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.*, 11 MCC 365 (1939); *Koppers Co. v. Langor Transport Corp.*, 12 MCC 741 (1938); *Hill-Clarke Machinery Co. v. Webber Cartage Line, Inc.*, 26 MCC 144 (1940); *Dixie Mercerizing Co. v. Motor Transport Co.*, 21 MCC 491 (1940); *Kingan & Co. v. Olson Transp. Co.*, 32 MCC 10 (1942); *Hausman Steel Co. v. Seaboard Freight Lines, Inc.*, 32 MCC 337 (1944).

[137] *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 MCC 337 (1944). The Commission has consistently cited the *Potato Chip* case as authority for its position in this respect. *Hill v. Penna. Truck Lines, Inc.*, 43 MCC 319 (1944); *Schaefer v. C. A. Conklin Truck Line, Inc.*, 43 MCC 333 (1944); *Armour & Co. v. Bell*, 44 MCC 35 (1944); *Victory Granite Co. v. Central Truck Lines, Inc.*, 44 MCC 320 (1945); *Freight Transportation Engineers, Inc. v. Great Central Transport Corp.*, 46 MCC 46 (1945); *Clark Thread Co. v. Atl. States Motor Lines, Inc.*, 46 MCC 49 (1945); *Servus Rubber Co. v. Merchants Motor Freight, Inc.*, 46 MCC 777 (1947); *Rhea Mfg. Co. v. Acme Fast Freight, Inc.*, 47 MCC 280 (1947); *Glenn L. Martin Co. v. W. T. Cowan, Inc.*, 47 MCC 303 (1945).

[138] Sec. 204(a)(6); 52 Stat. 1237, 49 USCA §304(a)(6) (Supp. 1947).

[139] Sec. 204(c); 54 Stat. 922, 49 USCA §304(c) (Supp. 1947).

ful, it had authority to issue an order declaring rates on past shiphents unlawful.[140]

The Commission's opinion on this point is, of course, entitled to great respect, but it cannot be regarded as conclusive. It rests, necessarily, on the premise that a passenger or shipper who has been injured by a carrier's breach of statutory duty to establish lawful rates and rules is entitled to maintain an action for damages against the carrier. But, as we have seen, this premise has been specifically denied by state courts construing analogous statutes. They have concluded that the statutes created new rights and remedies which superseded the common-law remedy of damages. If that remedy is unavailable, the incentive for finding, in the general provisions of the Act, an implication that the Commission has the power to make determinations in aid of the remedy disappears and jurisdiction so implied becomes a futility, under the reasoning of the Commission. Whether the remedy is available—and hence the validity of the Commission's premise—is part of the second phase of our present inquiry.

Retroactive Power in Courts

Turning now to our second question—whether the courts have jurisdiction to invalidate tariff provisions retroactively—we find ourselves confronted at the outset with Section 1106 of the Civil Aeronautics Act:

> "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." [141]

Although this purported reservation of common-law remedies is comprehensive in terms, the courts have been unwilling to construe such provisions to preserve rights which are inconsistent with the purposes of the statute in which they appeared. The wording of section 1106 is practically identical to that contained in the saving clause of Part I of the ICA.[142] In *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*,[143] discussed above, the Court recognized the existence of a common-law right to the relief sought, which was apparently pre-

[140] An interesting variation of the assertion of the ICC's conception of its authority in this respect appears in *United States Rubber Co. v. Associated Transport, Inc.* (Doc. No. MC-C-871, Feb. 16, 1948). The carrier determined that rates charged on certain shipments were inapplicable and sought to collect the additional charges under the applicable tariff. The complaint alleged that the charges sought to be collected were unreasonable and requested the ICC to prescribe reasonable rates for the future and authorize the carrier to waive collection of outstanding undercharges. The carrier admitted that the charges were unreasonable and was willing to waive them. The ICC not only concluded that rates on past shipments were unreasonable, but also expressed the opinion that the carrier could waive collection of undercharges on the basis of rates found to have been reasonable. It reached this conclusion by interpreting the prohibition against departures from the filed tariff in light of the provision making the charging of unreasonable rates unlawful.

[141] 52 Stat. 1027, 49 USCA §676 (Supp. 1947).

[142] Sec. 22; 24 Stat. 387 (1887), 49 USCA §22 (1940).

[143] 204 U.S. 426 (1907).

served by the saving clause. But in refusing to enforce the right, the Court said:[144]

> "This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

Again, in *Robinson v. B. & O. R.R.*,[145] a shipper sought to recover damages based upon payment of allegedly discriminatory rates, without prior resort to the ICC. The Court referred to the saving clause in the following language:[146]

> "Of course, the provision in §22, as also the provision in §9, must be read in connection with other parts of the act, and be interpreted with due regard to its manifest purpose; and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or State, in the absence of an appropriate finding and order of the Commission."

When the Carmack Amendment[147] was added to the ICA, it also contained a proviso purporting to preserve remedies which were available under existing law. Nevertheless, the Court, in *Adams Express Company v. Croninger*,[148] rejected the contention that the proviso preserved remedies provided under state law:

> "But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier, conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.
>
> "What this court said of the 22d section of this act of 1887 in the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* . . . is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in the 20th section, that it was evidently only in-

---

144 *Ibid.*

145 222 U.S. 506 (1912).

146 *Ibid.*

147 Sec. 20(11); 34 Stat. 595 (1906), 49 USCA §20(11) (1940). ". . . *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law: . . ."

148 226 U.S. 491 (1913).

> tended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the interstate commerce act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act. Again, it was said of the same clause, in the same case, that it could not in reason be construed as continuing in a shipper a common-law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.
>
> "To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

It seems clear, in the light of these decisions, that the provisions of Section 1106 do not provide a ready and automatic answer to our question. Common-law remedies were preserved only to the extent that they are consistent with general purposes of the Act and the regulatory system created by it. Hence we must look to the rest of the Act to determine the scope and effect of Section 1106. But before doing that, it may be helpful to review the experience under other regulatory statutes and the judicial reactions to the question.[149]

The treatment of the problem by state courts has varied under different state regulatory acts. In general, however, where the statutes provide for comprehensive supervision of tariff provisions by the administrative agency and grant no express reparation authority, the courts have concluded that the common-law rights of passengers and shippers based upon unlawful tariff provisions have been superseded by statutory remedies. In some cases, emphasis is placed on

---

[149] The opinion of the Court in *Siwalk v. Pennsylvania-Central Airlines Corp.*, 1 Avi 900 (Cir. Ct. Wayne Co., Mich. 1940), has received considerable attention since it is one of the few judicial expressions touching upon the efficacy of a tariff provision filed by air carriers. That case was an action for damages to the plaintiff's baggage while she was a passenger on an intrastate trip. A bottle of mouthwash which she carried in her traveling bag was broken as a result of the negligence of the airline's employee. The airline had on file with the CAB a tariff which provided, among other things, that "liquids" were unacceptable as baggage. The plaintiff received a baggage claim check which had written on it "subject to tariff rules and regulations." The case was tried on stipulated facts, and the Court held that the plaintiff was an intrastate passenger even though the airline was of an intrastate and interstate character. Then, assuming that the tariff filed pursuant to a federal act controlled, the Court construed the tariff provision as not prohibiting the inclusion of a small amount of mouthwash in the passenger's baggage. The court pointed out that if the tariff were not applicable to intrastate trips, the plaintiff would be entitled to recover under the stipulated facts which, under Michigan law, amounted to a stipulation of negligence. While the validity of the tariff provision was not at issue, some observers seem to feel that had the Court felt constrained to rule that the mouthwash was excluded from acceptable baggage under the rule, it would have held the rule to be invalid.

the fact that tariff rates are established by the commissions themselves and, therefore, can only be changed prospectively in accordance with the statutes.[150] In such cases, the rates are conclusively presumed to be lawful as long as they remain in effect. In other cases, while relying on the legislative nature of the tariff provisions because of the power granted the commissions to prescribe rates, the courts have reached the same conclusion with respect to tariff provisions initiated by the carrier.[151] Although, in some cases, a common-law right of action has been held to survive notwithstanding the absence of a reparation power in the regulatory act,[152] a majority of the cases support the position that any common-law right of action, based on unlawfulness of tariff provisions, must give way to remedies provided by the statutes themselves.[153]

A clear statement of the reasons for acceptance of this principle is to be found in *Purcell v. New York Central R.R.*[154] There a shipper, after the State Commission had prescribed rates for the future, brought an action for damages and sought to use the Commission's determination as the basis for the charge that the rate paid in the past had been excessive. The New York Act, significantly, granted the Commission power only to modify tariffs prospectively. In concluding that all common-law remedies had been superseded by the New York Act, the Court stated:[155]

> "When the railroad filed its tariff schedules as required by section 28 of the Public Service Law, these were the lawful charges to be paid by the brick company for its shipments of brick. The shipper could not legally pay less, the railroad could not charge more or less. These were the rates fixed according to the statute until modified as therein provided. A subsequent change, although delayed, did not make the prior charges illegal or unreasonable. The statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and supersede all common-law remedies. As long as the charges enforced are those on file with the commission, they are the only lawful charges which may be collected. No departure from the filed rate is permitted.
>
> "The Legislature has provided a means for the protection of shippers against unreasonable rates. The action at law resulted in

[150] *Woodrich v. Northern Pac. Ry.*, 71 F. 2d 732 (C. C. A. 8th 1934); *Montana Horse Products Co. v. Great Northern Ry.*, 7 P. 2d 919 (Mont., 1932); *Sunburst Oil & Refining Co. v. Great Northern Ry.*, 7 P. 2d 927 (Mont., 1932); *Mathieson Alkali Works, Inc. v. N. & W. Ry.*, 137 S. E. 608 (Va., 1927); see *Gurney Heater Mfg. Co. v. New York, N. H. & H. R. R.*, 162 N. E. 897 (Mass., 1928); *City of Boston v. Edison Elec. Illuminating Co.*, 136 N. E. 113 (Mass., 1922).

[151] *Miller Mill Co. v. Louisville & N. R. R.*, 92 So. 797 (Ala., 1922); *Young Heading Co. v. Payne*, 89 So. 782 (Miss., 1921). See statement by court in *Mathieson Alkali Works, Inc. v. N. & W. Ry.*, *supra* note 150, that no affirmative duty was imposed on commission to determine reasonableness of all rates but that it is contemplated that all rates are to be approved.

[152] *National Radiator Co. v. Penna. R. R.*, 143 Atl. 85 (N. J., 1928); see *Sonken-Galamba Corp. v. Mo. Pac. R. R.*, 40 S. W. 2d 524 (Mo., 1931); *Houston Chamber of Commerce v. Railroad Comm. of Texas*, 19 S. W. 2d 583 (Tex. Civ. App., 1929).

[153] *Kemp Lumber Co. v. Atchison, T. & S. F. Ry.*, 9 P. 2d 387 (N. M., 1932).

[154] 197 N. E. 182 (N. Y., 1935), *cert. denied* 296 U.S. 545 (1935).

[155] *Ibid.*

> different rates for different shippers dependent upon the opinion of juries as to what was reasonable. The statute makes the specified rate as fixed uniform and lawful until changed by or with the permission of the commission.
>
> "We therefore hold that the remedy provided by our Public Service Law for excessive rate charges is the only relief open to the plaintiff under the circumstances here set forth . . . This question was left open in the *Murphy* Case . . . We now decide it." [156]

At an earlier stage of the proceedings in this same case,[157] it was contended that survival of the common-law remedy under the statute was supported by statements in opinions of the primary-jurisdiction cases under the ICA. But the court distinguished those cases as arising under an act which specifically provided a statutory liability for damages:[158]

> "Plaintiff's argument for a statutory action finds support in statements in the opinions in cases decided by the Supreme Court of the United States [citing the *Abilene* and *Robinson v. B. & O. R. R.* Cases] made in reference to the federal act to regulate commerce, which does provide a statutory cause of action. A corresponding right to bring an action is not contained in the state law. There the rights of the shipper are protected by the power of the Commission summarily to suspend a filed rate and fix a temporary rate for a period which ordinarily would permit a full hearing and final determination and the fixing of a permanent rate which, to the Commission, seemed fair to both parties . . ."

The primary jurisdiction cases under Part I of the ICA also recognize that the purposes of the ICA would be defeated if courts were to exercise the right to determine the validity of tariff provisions retroactively. The compelling reason for the pronouncement of that doctrine was the statutory objective of uniformity and the necessity of avoiding the risk of divergent decisions by different courts and juries. This is apparent in the opinion of the Court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*[159] in which the doctrine had its origin:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble duty, between the provision for the

---

[156] See also *Miller Mill Co. v. Louisville & N. R. R.*, 92 So. 797, 802 (Ala., 1922): "Such schedules cannot be made unlawful for and during the period of their approved operation by any subsequent retroactive finding and order of the commission. Such a practice would be odious to the generally established notions of justice, and would, moreover, be utterly subversive of the policy and utility of any system of rate regulation; for no rate could be relied upon as stable, and neither the carrier nor the shipper could ever be certain of the basis upon which business was being conducted. . . ." *Young Heading Co. v. Payne*, 89 So. 782, 786 (Miss., 1921): "If the contention on behalf of the appellant were sound, the whole scheme and plan of the supervision statutes would be upset, because varying judgments might be rendered by different shippers, even though each case was based upon identically the same state of facts. Thus instead of having uniform and fixed rates the result could and might be a different rate for every shipper who chose to go into court in a suit against the carrier to test an alleged overcharge. . . ."

[157] *Purcell v. New York C. R. R.*, 242 App. Div. 292, 275 N. Y. Supp. 70 (1934).

[158] *Id.* at 73.

[159] 204 U.S. 426 (1907).

establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergency between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in

> the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

It must be remembered that this doctrine was developed under Part I of the ICA, which not only provided specifically for liability on the part of carriers and made it enforceable in federal courts, but also purported to preserve all common-law remedies. The doctrine has been applied both in cases involving lawfulness of tariff rates[160] under Part I of the ICA, and in cases where tariff rules were an issue.[161]

Similarly, where an action for damages for alleged violation of the antitrust laws was based on a conspiracy to fix rates in restraint of trade, the Court's comment in approving a dismissal for want of jurisdiction affords additional evidence of judicial reaction to exercising a power to invalidate tariff provisions retroactively:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been injured in his business or property. Injury implies violation of a legal right. The legal right of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under §7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under §7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief . . ."[162]

One point emerges from these cases with remarkable clarity. Judicial authority to invalidate tariff provisions retroactively cannot be

---

[160] *Texas & P. Ry. v. Cisco Oil Mill*, 204 U.S. 449 (1907), action in state court for excess charges over reasonable rates; *Southern Ry. v. Tift*, 206 U.S. 428 (1907), suit to restrain carrier from increasing rates suspended pending application to ICC; *Robinson v. B. & O. R. R.*, 222 U.S. 506 (1912), determination of discriminatory practices referred to ICC; *Mitchell Coal & Coke Co. v. Penna. R. R.*, 230 U.S. 247 (1913), determination of reasonableness of allowances (otherwise rebates) referred to ICC; *Director General v. Viscose Co.*, 254 U.S. 498 (1921), reasonableness of tariff classification for ICC; *Lewis-Simas-Jones Co. v. Southern P. Co.*, 283 U.S. 654 (1931), reasonableness of rate; *J. C. Famechon v. Northern Pac. Ry.*, 23 F. 2d 307 (C. C. A. 8th 1927), whether filed rate included charge for refrigerator cars; *Atlantic C. L. R. R. v. Delaware & H. R. Corp.*, 86 F. 2d 721 (C. C. A. 2d 1936), reasonableness of carrier's rates or division of joint rates; *El Dorado Terminal Co. v. General American Tank Car Corp.*, 104 F. 2d 903 (C. C. A. 9th 1939), reasonableness of rates.

[161] *Morrisdale Coal Co. v. Penna. R. R.*, 230 U.S. 304 (1913), car distribution rule; *Midland Valley R. R. v. Barkley*, 276 U.S. 482 (1928), car distribution rule; *Northern Pac. Ry. v. Solum*, 247 U.S. 477 (1918), routing practice; see *B. & O. R. R. v. U.S.*, 215 U.S. 481 (1910); *Great Northern Ry. v. O'Connor*, 232 U.S. 508 (1914); *Boston & Maine R. R. v. Hooker*, 233 U.S. 97 (1914). See also *U.S. v. Pac. & A. R. & N. Co.*, 228 U.S. 87 (1913).

[162] *Keogh v. Chi. & N. W. Ry.*, 260 U.S. 156 (1922).

exercised without destructive effects upon the statutory scheme of uniformity. And this is true whether or not the statute provides the injured passenger or shipper a remedy in damages. Even though the statute expressly affords that remedy, and expressly confers jurisdiction on the courts to enforce it (as in the case of Part I of the ICA), the courts will refrain from exercising jurisdiction until the determination of invalidity has been made by the administrative agency charged with primary responsibility for administration of the statute. In no other way can the right to damages be reconciled with the paramount objective of uniform treatment for all. In the case of those statutes which do not expressly reserve common-law rights or provide for civil liability on the part of the carriers, the courts have, in many cases, concluded that the preservation of such rights would be inconsistent with the objective of uniformity and have construed the statute as abolishing that type of remedy. Under both types of statutes, great stress has been laid upon the statutory objective of uniformity and non-discrimination.

Conclusion

There can be no question that the Civil Aeronautics Act, like its predecessors, had as one of its major purposes prevention of discrimination and assurance of uniform treatment for all passengers and shippers similarly situated. In providing regulatory means to achieve that end, Congress borrowed heavily from the experience under Part I of the ICA. However, it omitted—and we must conclude deliberately—provisions contained in Part I of the ICA which imposed civil liability for violations of the ICA, and which authorized either the ICC or the federal courts to enforce such liability. Moreover, the powers of the CAB to determine the validity of tariff provisions were expressly made prospective. No intimation can be found in the Civil Aeronautics Act that a passenger or shipper should be entitled to relief from unlawful tariff provisions involved in past transactions, unless it is contained in the general reservation of common-law rights contained in Section 1106. As we have seen, however, that section must be construed as preserving only those rights which can be exercised consistently with the other provisions of the Act and its general objectives.

If the objective of uniformity is to be accorded weight in construing the Act, only two implications are available. One would be to construe Section 1106 literally, but subject to an implied primary jurisdiction in the CAB to make necessary determinations of validity. This construction would complete the analogy to the pattern provided by Part I of the ICA, minus only a power in the Board to award reparations. The other alternative is that adopted by many of the state courts in construing their regulatory acts, i.e., to say that rights and remedies provided by the Act are exclusive and have superseded any

common-law right to relief from unlawful tariff provisions involved in past transactions.

The choice between these two alternatives is really a choice between partial uniformity and complete uniformity. The preservation of a common-law right to damages, or the right to avoid an unlawful tariff provision, no doubt affords an additional sanction with which to enforce the statutory duty of carriers to publish only lawful rates and rules. It does, however, destroy the possibility of achieving complete uniformity. A simple example will show this. If the rate charged during a given period were later found to be excessive and unlawful, recognition of a common-law right to damages for the excess over the reasonable rate would provide relief only to those shippers who filed their actions within the allowed time. Even though the danger of diverse decisions were avoided by application of the primary jurisdiction doctrine, many thousands of shippers who were charged that rate during the period of its invalidity would not for one reason or another, obtain relief to which they were entitled. Some might not know of the availability of the remedy. Some might feel that the amount recoverable would not justify the expense of litigation. But whatever the explanation, it is virtually certain that the number of shippers who obtained relief would be relatively small, compared to the total number who were injured by the unlawfulness of the rate. To recognize their right to damages, therefore, is to grant to those shippers who pursue their remedy a preference over those who do not. It seems obvious, therefore, that adoption of the first alternative cannot, as a practical matter, produce complete uniformity of treatment. On the contrary, it is certain to result in preferences for those passengers and shippers who are either sufficiently diligent or sufficiently litigious to pursue their remedies in every case.

On the other hand, the second alternative guarantees complete uniformity of treatment for all. As long as the tariff provision remains in effect, it is binding on all. The only relief is prospective, and that relief redounds to the benefit of all. Certainly, then, the second alternative is the more consistent with the general purposes of the Act. And it gives effect, as the first does not, to the differences in the provisions of the Civil Aeronautics Act and Part I of the ICA—differences which, under the normal rules of statutory construction, must be regarded as deliberate and significant.

It may be claimed that if the second construction were adopted, the passenger or shipper who had been injured by an unlawful tariff provision would be left without a remedy. But the public is not left to the mercy of the carriers. The Civil Aeronautics Act provides a comprehensive system of controls and supervision which adequately safeguards the public from breaches of duty by carriers. The carriers must file and publish tariffs[163] containing all their rates and rules.

[163] Sec. 403(a); 52 Stat. 992, 49 USCA §483(a) (Supp. 1947).

Thus the public receives notice of the complete terms upon which transportation is offered. Strict observance of the tariff as filed is required of the carrier.[164] Any departure from the tariff is made a criminal offense,[165] and the carrier may not change any filed tariff except after thirty days' notice of the proposed change, unless the Board, in the public interest, allows such a change upon shorter notice.[166] As a further guarantee of equality of treatment, a positive duty is imposed on the carrier to establish and observe just and reasonable tariff provisions,[167] and discrimination resulting from application of the tariffs is prohibited.[168]

But the Act does not rely solely upon the voluntary compliance by the carrier with statutory duties. The Board is authorized, upon its own initiative or upon complaint by the public, to suspend a tariff provision before it takes effect, if it has reason to believe that the provision does not comply with the requirements of the Act.[169] Furthermore, even after the tariff provision has taken effect, the Board has authority to conduct investigations of[170] the lawfulness of the provision, either upon its own initiative or upon complaint, and if it finds the tariff provision to be unlawful, it may prescribe the lawful provision thereafter to become effective.[171] The public, therefore, has been provided for its protection with a full arsenal of remedies, both preventive and punitive.[172]

---

[164] Sec. 403(b).
[165] Sec. 902(a) and (d).
[166] Sec. 403(c).
[167] Sec. 404(a).
[168] Sec. 404(b).
[169] Sec. 1002(g).
[170] Sec. 1002(a) and (b).
[171] Sec. 1002(d).

[172] In construing the state statutes containing similar comprehensive provisions, the courts, generally, have recognized that the statutory provisions completely safeguard the rights of the public. *Purcell v. New York C. R. R.*, 197 N. E. 182 (N. Y., 1935); *Mathieson Alkali Works, Inc. v. N. & W. Ry.*, 137 S. E. 608 (Va., 1927); see *Commonwealth ex rel. Appalachia v. Old Dominion Power Co., Inc.*, 34 S. E. 2d 364 (Va., 1945). The court in *State ex rel. Standard Oil Co. v. Dept. of Public Works*, 53 P. 2d 318, 319 (Wash., 1936), in denying a power of the department to award reparation based on unreasonable charges prior to the date of the complaint (the statute conferred such power only after complaint), summed up the reasons as follows:

> "This court, in its construction of our statutes relating to the subject matter, has reached a different conclusion. The difference between a legal and a lawful rate is not recognized, but, on the contrary, the rates specified in the schedules filed and in effect are held to be the only lawful rates and remain such as long as they are effective.
>
> "The appellant argues that to deny recovery as against an allegedly unreasonable rate, prior to the date of filing a complaint with the department, is in effect the denial of a common law right and leaves a wrong without a remedy. But our statute requires that all rates be reasonable, and to insure this, prescribes that they be filed and published with the regulatory authority for a named period before their effective date, so that everyone concerned may have notice with an opportunity to challenge them; and the department of public works may, upon its own motion, suspend them pending investigation. They are also subject to challenge after their effective date by anyone affected. So long as they remain effective and unchallenged, they are presumed to be reasonable . . . Without further analysis, we think that the statute law, when read and considered as a whole, leads to the view, and we must hold, that when a rate is filed, published, and permitted to become effec-

The conclusion that a tariff provision properly filed under the Civil Aeronautics Act cannot be avoided or invalidated retroactively seems inescapable. To recognize existence of such a power in either the CAB or the courts would defeat one of the principal purposes of the Act—uniformity of treatment. In the face of legislative history, constructions placed upon similar state statutes, and provisions of the Act itself, it is believed that the remedies specifically provided by the Act were designed to be exclusive. As a result, a tariff is equally binding on both parties as long as it remains in effect. It *is* the contract of carriage and is unimpeachable until changed.

---

tive by the department, it is and remains, until challenged in the manner provided by statute, the lawful rate and the only rate to be charged and collected. . . . Otherwise, the carrier would never know what its lawful earnings were and could never allocate its earnings to betterment and dividends without the possibility of being embarrassed by delayed orders to make restitution. It cannot be the legislative intent that its only protection in that respect is the two-year limitation contained in the statute. Therefore, when a schedule is challenged, that challenge should affect the scheduled rates only from the date of the filing of the complaint."

AIR ROUTES UNDER THE CIVIL AERONAUTICS ACT*

By James M. Landis

Formerly, Chairman, Civil Aeronautics Board and Co-Chairman, Air Coordinating Committee, 1946-47. Princeton, A.B., 1921; Harvard, LL.B., J.S.D., 1924 and 1925; Fouad University (Cairo) LL.D., 1945. *Formerly*, Dean of Harvard Law School, 1937-46; member, Federal Trade Commission, 1933-34; member, S.E.C. 1934-37 and Chairman, 1935-37; Director, Office Civilian Defense, 1942-43; Minister to the Middle East 1943-45. Director, Colonial Airlines, 1948; Trustee, Franklin D. Roosevelt Memorial Library.

OUR existing pattern of air routes has been the subject of frequent criticism by many groups and individuals including myself. Certainly as one views it in the broad it possesses many elements of weakness. These are, in the main, two—inherently weak routes and the integration of routes into weak systems.

It certainly was the intent of the Civil Aeronautics Act (Act) to avoid the development of such a situation. We had been through it in the case of the railroads, and the railroad situation was and still is bedevilled by this problem. The powers conferred upon the Civil Aeronautics Board (CAB) were conferred with the aim of preventing a repetition of exactly that situation, and yet it has repeated itself. There is no question about that. The profit and loss statements of the airlines speak more loudly than I can. So that it has become time to look the facts in the face and see what we can do about them.

A partial cause for this situation lay in the fact that the new governmental agency under the Act did not have a clean slate upon which to write. The existing lines were given grandfather rights and became permanently entitled to fly the routes that they had pioneered. Most of these were initiated under the supervision of the Post Office. Its planning in this respect was both good and bad, leaving the overall national situation in a piebald condition. Some weakness prevailed where local pressure ran away with wise judgment. But, as a whole, the recognition of grandfather rights was not too serious a setback to the development of an adequate air transportation system.

The real difficulties began with the Act. The first and greatest of them lies in its mail pay provisions. Few people on the outside seem to be familiar with the theory of mail pay. Yet an understanding of it is basic to practically everything in commercial aviation.

It was recognized by the Congress that some subsidy was essential for the development of air transportation. The idea of subsidy was not new; it was present from the start. But the approach of the 1938 Act was new, for as it has been interpreted, the Congress authorized the CAB to guarantee in perpetuity, according to the viewpoint of

* Address delivered before The Association of the Bar of the City of New York, April 12, 1948.

my former colleagues, mail pay sufficient to provide a fair return on any system that the CAB decided that it was desirable to fly in the interest of public convenience and necessity.

The largeness of that guaranty may not be apparent on its face. But when you examine it, I doubt whether you will find an equivalent power committed to any other public agency. For it in substance gives the Board a blank check to string air routes across the face of the United States as well as the world without regard to the financial burdens that this may entail, limited only by the Board's conception of public convenience and necessity.

There are, of course, a few other limiting conceptions, but very few. There is the limiting conception of honest and efficient management, namely, that Congress does not obligate itself to reimburse management for corruption and stupidity—a concept difficult to apply in practice. There is the practical limitation that too extraordinary a bill might so shock the Committee on Appropriations as to induce the Congress to renege upon the pledges that it authorized its agent, the CAB, to make. There is the limitation inherent, I believe, in the concept of public convenience and necessity, namely, that public desirability must be weighed against public cost, but this concept, innately incapable of mathematical application, seems to have little strength as witness the Board's continued authorization of Chicago & Southern's New Orleans-Havana flights and its recent authorization of the extension of those flights to Caracas. Never in history has the public been asked to pay so much for so little.

But other than these, there are no limitations. There is no budget in the light of which the cost of present operations and contemplated expenditures needs to be measured. Indeed, as regards present net revenue, the recent annual statements of most of the airlines are meaningless, for petitions for revised rates are pending and most of the airlines are operating under temporary, really tentative, rates far below what they are entitled to receive, not only for the future but for some time in the past. And if a move now being sponsored by some of the carriers for so-called retroactive rates, that is, rates higher than those under which they were operating without the slightest complaint, succeeds, operations both for the past and for the future may be put upon a cost plus basis.

There is no limitation to the effect that mail pay will be available only on those routes that the Post Office wants to have flown. Indeed, under the law the Post Office can be required to meet the costs of flying both routes and schedules that it deems utterly useless for postal needs.

There is not even the limitation that this largess authorized to be paid to a holder of a certificate can ever be effectively stopped despite whatever original misjudgment may have occurred in its issuance, or

whatever changed factors may characterize the operation. My own view is that, since public convenience and necessity was the basis for the issuance of a certificate, the absence of public convenience and necessity should be ground for its termination. But this view was opposed by my colleagues and found no favor with the President's Air Policy Commission (PAPC). As the New Yorker has recently remarked, "God rest ye, merry taxpayers."

These consequences that by law attached to the initiation or extension of air routes, attracted little attention between 1938 and 1946. Those years remind of the years 1924 to 1929 in the stock market. Then any bet on the long side was good, and similarly from 1938 to 1945, any extension of any air route seemed to be wise. And it was in this period that the doctrines involving new routes and extensions were evolved.

This leads me to my second point regarding the manner of building air routes under the Act. If circumstances enable one conveniently to forget the financial implications involved by the creation of an air route, it may be possible to turn the question over to the lawyers for handling through the litigious processes of notice and hearing and the like. This, at least, was what the Act did. It built imitatively upon the techniques present in the Interstate Commerce Act dealing with the extension and abandonment of railroads, forgetting that in that field the driving force was private initiative and the willingness of private groups to gamble for profits and to absorb losses, while in the air transport field there were to be no losses—just subsidy.

A friend of mine, counsel for one of the larger airlines, has recently examined all the decisions of the Board in this field. He has been grieved to find that they lack a doctrinaire consistency—and he has rightly found my decisions to fit within that category. But I think he has misconceived the basic nature of the function underlying —or at least that should underlie—the Board's actions in route grants. Like a hundred others at the Civil Aeronautics Bar he has treated it, under the drive of the statute, as a judicial or quasi-judicial function. But, whatever the statute may say, it is not that. It is, in fact, an underwriting or banking function with two differences. The first is that the bonds need not be sold, and the second is that the measurement of return must include but must not be limited to dollars and cents.

This latter fact is important. National defense, the stimulation of commerce, the postal service (which can rightly be a source of profits as well as losses) are all elements of the public return. But basically it is an issue of return versus investment and, as such, amenable to the banking or underwriting technique rather than the legal one. If we look at it in this fashion, what real reason exists for sticking to a record perhaps two years old when more pertinent and reliable facts are to be found outside the record?

The only reason that suggests itself, apart from the vested interest of lawyers in their own tactics, is the danger of the misconstruction of facts not subjected to cross-examination and the existence of undue pressures not openly presented and articulated.

The first seems to me an ungenerous comment upon the techniques of professions other than the law to arrive at reasonably correct solutions. Both from the standpoint of public influence and private profit, the decisions of, say, Morgan, Stanley & Company or Dillon & Reed, have wide significance. Beyond calling, under the Securities Act, for the basic facts upon which they rest, we permit them to have their influence and rely upon them for building up empires of steel or chemicals or chewing gum. Their inherent rightness is, perhaps, as much to be trusted as similar judgments by a quasi-judicial tribunal.

The second problem—that of undue pressure—is a diffcult problem. But no quasi-judicial tribunal in my experience has been immune from such pressures. The forms of law clearly help to reduce the power of their impact, but they do not eliminate them. The real barrier against them lies in the traditions and ideals of the personnel entrusted with the responsibility of administration. The development of these barriers is made much more difficult, for example, in the CAB than most other agencies, for the clientele there is limited and airlines once admitted to the inner sanctum of certification ally themselves through a powerful and costly lobby against anyone on the outside. The present tactics employed in the Air Freight and Air Freight Forwarder Cases are perfect illustrations of this.

It is the process that interests me, for no one can be happy with the results that have thus far been produced. Let me take, for example, as an illustration the problem of feeder routes in a so-called area case. The area to start with is a country in itself, larger than France or Germany or the Argentine. It is already criss-crossed by a number of trunk routes. Plans for intermediate or feeder routes of varying kinds have been presented. Statistics on population, their peregrinating habits, even the number of fire-plugs, are available. Cost data of the most primitive type is all that has been offered, but lawyers' briefs in abundance are at hand. And from this mass of material a group of men whose acquaintance with the territory may be negligible are supposed without consultation to devise a plan of airline operation that will not only meet the needs of the area, but also be a feasible one to operate. The task, to be properly performed, calls for knowledge not merely about various communities of interest within the area, but airport conditions, types of available equipment, ship utilization and ship distribution, air navigation facilities, and a hundred and one other things. And the result of that judgment may cost the taxpayer $1,500,000 or more a year for at least three years and probably longer. Would any other nation build their airlines this way? Would we devise a scheme for the development of a river basin in this fashion?

A more sensible approach to me would be to determine first what area could profit from such a service, what applicant or applicants among the many could best be trusted with the presentation of a plan, call for these plans, determine which one shows the most promise and, in the light of that, after free and unhindered consultation, promulgate the scheme. At that time the interested communities could be called upon to give their views and such modifications could then be made as might be deemed desirable. But the legalistic approach called for by the Act makes such a technique impossible.

The same technique is equally adaptable to the extension of trunk routes. The problem there again is a twofold one—the needs of the various systems and the needs of the communities. I have put them in this order, because I believe they come in this order, for, if the systems are adequate, the needs of the communities can be met.

When I was with the Board, I had the opportunity to inaugurate a series of studies on the weaker carriers with the aim of getting some knowledge of their weaknesses, whether these weaknesses lay in route patterns or management, and what could be done about them. But the legal traditions immediately seized upon that effort. Instead of studies, they had to be investigations. And competitors under the whip of their lawyers insisted we could not benefit from these studies or utilize them in route or rate decisions, unless they could be mercilessly torn to pieces by cross-examination. The result, I gather, is that these investigations have now been buried, because their handling has become too difficult, too likely to create "error" for some gowned tribunal to pounce upon. And yet what more sensible way is there to approach this problem. The United States has underwritten these systems and it must continue to perform the underwriter's function—liquidate at the best figure or else make it possible to operate at a reasonable cost.

The emphasis upon communities comes second. I say this deliberately and with the public interest at heart, for the public interest is not served, as the residents of Long Island or Vermont can testify, by poor transportation facilities. To weaken a system internally by extending a new airline into its territory, when an exchange of trackage and air rights will adequately meet the needs of the communities, is wrong. Or to refuse to extend a system into territory of a competitor, when the competitor can stand it and the extension is absolutely necessary, is equally wrong despite the fact that more service is not required by the communities involved. The efficiency of the systems is the heart of route planning.

There may well be too many systems, and means must be found for their better integration. As the history of the railroads abundantly illustrates, some propulsive force from outside is necessary if real progress is to be made. This is more markedly true in the airlines where frequently the competition is less between systems than personalities —personalities as colorful and ambitious as any that our railroad his-

tory developed. In the Route 68 case, I thought it possible within the Act to find such a force in control over the bases of exchange and sale, but my colleagues thought otherwise. But so long as mail pay remains what it is, the price of an inefficient system will remain too high to permit reasonable integration with another system, and the program of merger and consolidation will remain at a standstill.

Criticism of the air route system developed by this adversary, litigious process too frequently directs its barbs towards the result and not the processes which make such a result inevitable. A portion of the industry alleges too much competition has been introduced: This is true. Another portion upbraids the Board for introducing too little competition. This also is true. These are, of course, patent self-serving declarations by the various airlines. They point to certain facts but produce no answers. Nor has an answer to this problem been forthcoming. The PAPC's suggestion that an overall national plan should be evolved puts the cart, I believe, before the horse. The most productive answer, in my judgment, is to think and plan in terms of systems. If plans could be evolved for the future of Northeast, Colonial, Pennsylvania Central, Continental—to mention a few—in the light of available traffic resources—plans calling for expansion, contraction, or merger—we might have one foot on the bottom rung of the ladder. Route issues, on the other hand, are no problem for systems such as Eastern or American or United. For, except in so far as these systems have to be expanded to service certain new public needs, their patterns present no problem. For, if systems such as these cannot be operated at a reasonable cost, the problem is not routes but is either management or the rate structure of the whole industry.

The deficiencies of the present adversary process are to be found not only in the ultimate results. It is time-consuming, and the time is spent too often on unimportant details. Records so old that they reflect an earlier era are purported to be the basis for action. And if the process works as it should, a doctrinaire and not a business judgment is the outcome. We would hardly dare to handle loans from the Reconstruction Finance Corporation on this basis, and yet I venture that a more thorough realistic basis underlies the loaning judgment than, say, the extension of Western Air Lines to Mexico City, Eastern to San Juan, or Chicago and Southern to Kansas City.

Indeed, the remarkable thing is that the process has worked as well as it has. From the standpoint of community need both nationally and internationally, there are few gaps in our route pattern so far as passenger traffic is concerned. Cargo is a horse of a different color. But system-wise the pattern has its outstanding weaknesses. System-wise too often it has been traded rather than engineered. Lobbying directly and indirectly has therefore gained a hold that is worrisome, and recent events make plain what was heretofore an open secret of the industry, that advance notice of decisions could be had. But

these are passing phases. The real difficulty is statutory—a debilitating mail pay theory and an adversary technique that makes underwriting judgments difficult to attain.

To evolve a different approach is not easy. But I do think the Congress is entitled to say to civil aviation what it has said even to military aviation — prepare and work within a budget. This would involve, in turn, the imposition of budgets, so far as mail pay is concerned, upon the airlines. There would, of course, be bankruptcies but a commercial world without failures that have to be paid for is not to be found this side of paradise.

It may be that we can prolong this era of not accounting for results. The threat of war may permit the substitution of a military for a civil economy. The industry may be able to defer casting up its accounts until the international peril is over. But, were it not for this fact, it would be wise for the industry to insist upon some system of national budgeting before the demand will arise in other less friendly quarters. There are no figures today of any reliability with regard to the cost to the taxpayer of the service with which he is provided. And not even the propaganda of the "dynamics inherent in air transportation" will forever shut out an analysis of these facts. "Wings for a nickel" is nice for the crowd and perhaps as profitable to the gladiators as the circuses at Rome, but only a proper accounting would tell the public that the slogan is either true or fundamentally false.

In a sense the issue of routes for passenger traffic is a dying issue. Its decease will be mourned by those at the aviation bar who have trafficked handsomely in it in the past. Rather it is operations that now comes to the fore. How can we best operate the system that has been created, is the real question at issue. And this involves the standing of the different systems, rates, equipment, and safety. But routes can never quite be forgotten. The development of equipment alone calls for their constant rewriting. And systems must be brought to some kind of internal balance. The very shift in the nature of the problem may forcibly evolve a different type of technique—of planning rather than adjudication, of less reliance on legal shibboleths and more attention to the public return to be had from public investment. It still will require a broad gamble to be made by the public, but after all these years the extent and nature of that gamble and the portion of it that the public, as against private groups, should bear ought to be capable of being made more precise. Otherwise a change in public temper may dry up not only private but public funds, and a more serious blow to the future of air transportation cannot be imagined.

An overhauling of the basic concepts of the Act consequently seems to be demanded. It must go further than the resolution of certain bureaucratic difficulties, which, I am afraid, is about all that the

PAPC has suggested in this particular field. Are we still prepared to give the CAB or some similar agency a blank check, and, if so, is it wisest to continue to resolve these issues through the building of records and the haranguing that then ensues? I have acquired my doubts as to the validity of this method of administration transplanted to a field where subsidy looms so large and leads to consequences and attitudes awry with our traditional theories of private enterprise. I think so more because I have learned to have an appreciation of the drive and energy and even sacrifice of men in the field of aviation. The system should reward qualities of that character. But it will do so only if its policies are sharply black and white and not the dull, deadening grey of an outworn paternalism.

COURTS NOW DEEM AIRPORTS NECESSARY

By ALFRED L. WOLF

General Counsel, Aircraft Owners and Pilots Association.

A BODY of case law has developed on the question of the airport's place in the community. Recent decisions offer ample material to one searching for authority in asserting the importance of airports and their attendant activity.

As the flood of illy considered, or lightly instituted, litigation against the construction or maintenance of airports seems to be steadily increasing, there are set forth here reactions representative of what might well be termed "airminded thinking" of several courts arising from a variety of suits brought against airport interests. The Courts of Florida, Michigan, New Jersey, Ohio, Pennsylvania, and Virginia have all recently decided litigation connected with the establishment of airports and it is interesting to notice the encouragement their decisions lend to the aviation industry. Selecting the most recent case, a decision by the Pennsylvania Supreme Court, captioned *Crew v. Gallagher*,[1] one finds the following passages:

> "There is nothing in the construction of an airfield, or in the necessary consequences of its normal operation in an agricultural district to create a nuisance . . .
>
> "The testimony discloses no additional volume of objectionable noise in comparison with the existing noise level in the immediate vicinity of the proposed airport. Farm tractors, passenger cars and heavy trucks on the adjacent highway, trains on the main line of the railroad nearby, and military and transport aircraft having no connection with the airport in question, already disturb the tranquility of this neighborhood. 'No one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells.' *Collins v. Wayne Iron Works*, 227 Pa. 326, 331, 76 A. 24."

The Pennsylvania court recognized that if the citizens of today are to accept the benefits of modern conveniences and scientific advancement, they also must be willing to accept as aspects of modern living the minor irritations which occasionally accompany such development. The opinion of the lower court granting an injunction restraining the use of certain property as an airport therefore was reversed.

In *Antonik v. Chamberlain*,[2] the Ohio Court of Appeals stated:

---

[1] Pa. Sup. Ct., Eastern Dist. (Mar. 25, 1948). 2 Avi 14, 587.
[2] Ohio Ct. of App., 9th Jud. Dist. (Dec. 23, 1947), 2 Avi 14, 500.

> "In our business of judging in this case, while sitting as a court of equity, we must not only weigh the conflict of interests between the airport owner and the nearby landowners, but we must further recognize the public policy of the generation in which we live. We must recognize that the establishment of an airport of the kind contemplated is of great concern to the public, and if such an airport is abated, or its establishment prevented, the consequences will be not only a serious injury to the owner of the port property but may be a serious loss of a valuable asset to the entire community.
>
> "To find that the use as an airport of approximately 450 acres of land beyond the city limits and away from the closely-built-up and congested part of the city is an unreasonable use of the land, would, we think, under the circumstances of this case, obstruct the development of aviation, as a legitimate and necessary industry, to an unreasonable extent.
>
> "Undoubtedly the plaintiffs will experience some discomfort, but that is one of the incidents or results of residing in a heavily-populated, highly industrialized state. It is an incident of living in an age of progress, in which there are erected huge rubber factories, with their accompanying smells and noises; in which the streets and highways are used by great, noisy trucks for transportation; in which commercial airliners ply the skies continuously, for the speedy transport of persons and freight; and in which thousands of various industries throughout the cities and countryside contaminate and defile the former natural beauty, peacefulness and quiet of the vicinage."

In this case, the plaintiffs sought to restrain, in anticipation thereof, the operation of an airport "because of (1) noise, (2) dust, (3) attraction of crowds, who will trespass on their premises, (4) annoyance in the peaceful enjoyment of their homes, (5) fright and fear of physical harm from low flying and the crashing of planes, (6) depreciation of property values." These allegations follow the formula of most earlier cases.[3] The trial court which had enjoined the airport project was reversed by the quoted decision.

Florida has spoken most dramatically. As recently as November 7, 1947, its Supreme Court, in *Frink v. Orleans Corp.*,[4] in overriding the attempt of the city of Miami Beach so to zone a portion of its land as to prevent the construction of an airport quoted the following passage from its earlier decision in *Stengle v. Crandon*:[5]

> "In almost every town of any consequence in Florida for more than three years the sound of airplanes has been almost incessant as men trained in them for the very purpose of safeguarding the constitutional guaranties, including the one that a person may not be deprived of property without due process of law, by warding off the attacks of enemies advocating the ideologies which were the very antitheses of the American system of government. These

[3] *Swetland v. Curtiss Airports Corp.*, 41 F. 2d 929, 1930 US AvR 21 (D.C. Ohio, 1930), modified 55 F. 2d 201, 1932 US AvR 1 (C.C.A. 6th, 1931); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385, 1930 US AvR 1 (1930); *Hinman v. Pacific Air Transport Corp.*, 84 F. 2d 755, 1936 US AvR 1 (C.C.A. 9th, 1936) *cert. denied* 300 U.S. 654, 1937 US AvR 173 (1937).

[4] Fla. Sup. Ct., Div. B (Nov. 7, 1947), 2 Avi 14, 468, 32 So. 2 425.

[5] Fla.—, 23 S. 2d 835 (1945).

> airplanes are not mere noisy nuisances, nor are they vehicles still in the experimental stage, but they represent the latest means of transportation, and certainly if we are to progress, the establishment of airports to accommodate them should be encouraged."

The *Stengle* case,[6] decided Nov. 27, 1945, was also an appeal from the action of a Zoning Board. Here the state supreme court, however, took the affirmative action of reversing an order dismissing a Bill of Complaint wherein the airport owner prayed that the Board be ordered so to zone his tract that he could construct an airport upon it.

In New Jersey aviation's maturity has been recognized and the New Jersey Chancery Court recognizes that like the steam railroad, aviation has passed its early days. The following language is taken from *Oechsle v. Ruhl*:[7]

> "Although not so alleged in specific words, the gravamen of the bill is that the construction of an airport constitutes a nuisance *per se*. The great advances made in aviation during the past three decades have clearly demonstrated the necessity of this type of commerce. Not only have there been tremendous and, in retrospect, almost unbelievable strides made in the construction of aeroplanes during this period of time, but the modernization of airport construction has had to keep pace with the advance of aeroplane construction. The thousands of airports and airfields in their varied and diverse locations are proof that they are not nuisances *per se*. The argument advanced by complainants is comparable to that advanced while steam railroads were in their infancy. The legislative grant of authority to the State Aviation Commission to issue licenses as above stated is a recognition of the construction, operation and conduct of an airport as a legal business."

In this case, a bill of complaint was filed asking an injunction, *inter alia,* against construction of an airfield which was stricken as to that prayer by the New Jersey Chancery.

Prior to Pearl Harbor, hostilities elsewhere had prompted the Federal Government to make aviation instruction available in Universities. The University of Virginia needed an airport for this activity. Neighboring landowners attempted to enjoin its establishment and on Sept. 5, 1940, the Virginia Supreme Court took a view parallel to that of the other states mentioned. In *Batcheller v. Commonwealth*,[8] much language encouraging to aviation's advocates can be found:

> "Aviation is a lawful business and the owner of real estate has a right to establish an airport thereon if it is properly located and properly operated, notwithstanding for aesthetic and sentimental reasons it may not be agreeable to persons owning fine country homes in the community." and
>
> "They have been fortunate in that they have been able to enjoy their country estate as they have for so long a time. They must now yield to change and progress of the time." and
>
> "It is inconceivable that Thomas Jefferson, who left this for his

[6] Idem.
[7] N. J. Chancery, 54 A. 2d 462, 2 Avi 14, 418 (1947).
[8] 176 Va. 109, 10 S.E. 2d 599 (1940).

> epitaph, now carved upon a shrine at Monticello: 'Here was buried Thomas Jefferson, author of the Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia', would have objected to or tolerated any objection to the establishment of the airport in question, shown to be essential to proper and full instruction in aeronautics, which is today so essential to the safety of the nation and the development of its commerce, and most probably had he been living at the time of the hearing upon the application for the permit in question, he would have been one of the strongest advocates for granting it. No reason is perceived why because the airport in question is located in an historic section in which many great men have lived and where they have died and were buried, scientific, educational, economic, and commercial development should not be sanctioned or countenanced, but instead such section should be left to the enjoyment of those having fine country homes, who object to any activity tending to interfere with their peace of mind, whatever that may be, or the quietude of the countryside, whatever that may be. If such a policy should be adopted, development of Virginia, so famed in history and having so many 'historic shrines,' would be seriously retarded."

In Michigan, an appeal was taken to the Supreme Court by divers plaintiffs who had failed in the Court below to prevent the City of Detroit from obtaining more land for its airport and to obtain relief from harm to neighboring properties by the airport's operation and management. In 1944 the Supreme Court in its decision, *Warren and Agar v. Detroit*,[9] said:

> "The city stated that the city might not use the proposed airport for the larger or heavier planes which necessarily fly much lower when landing or taking off, and could possibly cause a nuisance to plantiffs. If the airport cannot be used for very large airplanes, the city might find itself at the end of a side line, from which smaller craft would have to be flown to other cities which had the foresight to provide airports of a proper size in a locality free from obstacles so as to accommodate transcontinental and the other larger airplanes. We take judicial notice of the tremendous increase in the size of airplanes during the past few years."

The lower court was upheld and the appeal denied.

From these decisions of representative state courts one sees that today the careful advocate no longer need speak with a prophet's voice of the future treatment aviation will receive in the courts. These decisions demonstrate that the courts have and will continue to recognize the airport's place in the modern community.

---

[9] 308 Mich. 460, 14 N.W. 2d 134 (1944).

THE PARADOX OF THE AIRLINES*

By LaMotte T. Cohu

President, Consolidated Vultee Aircraft Corp.; Princeton University, A.B., 1917. *Formerly*: President, TWA 1947-48; Member of Board, TWA 1933-48; Chairman of Board and General Manager, Northrop Aircraft, Inc. 1933-47.

IN 1947 the airlines of the United States carried more passengers and cargo, did it more efficiently, and lost more money than ever before in their history. This startling paradox, of which there are few parallels in business history, is compounded from other paradoxes, confusions, miscalculations, and errors on the part of the airlines themselves, their suppliers, their regulating agencies, and the makers of basic government policy. This paradox has grown also out of many uncontrollable factors, such as the complexity of the airplane and its operation, the difficulties of rapid expansion, and the disruptions of the political and economic worlds.

We in airline management cannot alibi for our errors; nor do I think we should blind ourselves to the causes of our plight. We should not deal lightly with the blunders of government nor with the stark realities of basic economic upheavals. Our job is to find out why the paradox exists and to do all in our power to remove its causes. For we do know that a sound network of airlines is just as necessary for the social and economic welfare of this country, as for international security of the United States.

Taking domestic and international flag-carriers as a whole, every class of traffic — passenger, mail, express, and freight — increased in 1947 over any previous year. In 1947, for example, while passenger miles flown by domestic airlines increased only slightly over 1946, they were nearly six times those flown in 1940. Domestic express and air freight increased 112% over 1946 and amounted to a volume of ton miles 20 times the air express carried in 1940. In the international field, the three American flag-carriers handled 85% of all air passengers arriving in this country over the North Atlantic route and 75% of those who departed, over the North Atlantic, for overseas points. If all passenger arrivals from all foreign countries to the United States are considered for the year 1947, we find that the airplane brought in approximately 1½ times as many persons as did surface vessels. This is an increase, in seven short years, of more than eleven times in the volume of international air passenger business.

These traffic increases came despite the return, in 1947, of near nor-

* Based on Address before The Society of Automotive Engineers, April 15, 1948, New York City.

mal load factors, after a war period when we could handle only priority passengers and those few non-priority passengers with stamina to spend long hours at airports waiting for an occasional seat. The airlines carried the traffic because of a prodigious increase in plane miles which resulted from the adding of hundreds of Constellations, DC-6's, and DC-4's to their operating fleets.

Yet, with all this growth and with the complexities of breaking-in new airplanes, as well as the costs of preparing for the inauguration of others, the number of employees on the domestic airline payrolls at the end of 1947 was approximately 10% less than those on the payrolls a year earlier. In TWA, alone, the total number of employees have been reduced from over 17,000 (in the fall of 1946) to 13,000 at the end of 1947. And this reduction has been accomplished despite a 40.9% increase in the ton-miles of available capacity offered to the public. Despite the record volume of business, and the successful efforts for improving efficiency, the airlines of the United States suffered losses of more than $22,000,000 in 1947. And, if the overseas airlines are excluded — and certain estimated profits for 1947 still depend upon undecided air mail pay — the loss for all domestic airlines exceeded $20,000,000.

Mistakes of Airline Management

This paradox is not a one-year phenomenon. The early months of 1948 indicate that, unless rapid solutions of the underlying airline problems are found, the results for the year 1948 may show a similarly discouraging picture. Why this paradox? While the entire airline losses of 1947 *can* be attributed to governmental policies — both general and those specifically affecting the airlines — I would be less than candid if I did not admit our own mistakes and, at the same time, recognize those uncontrollable factors which have cost the airline business substantial sums of money.

In the wisdom of hindsight, it is easy to chide airline management for its mistakes. And I realize that one of the America's favorite indoor sports has become this criticism of airline management's optimisms, errors, and struggles to plan the air transportation business on a sound footing with a vastly increased volume and scope. At the same time, these mistakes have contributed materially to the airline paradox.

One of our principal mistakes was to plan too optimistically. When, in 1944, domestic passenger business was nearly 50% above 1943 and when, in 1945, this same rate of increase continued, it was not easy to estimate where the growth of business would stop. In the last year-and-a-half we have experienced this same kind of problem with air-freight, which has grown at a faster rate than our passenger business ever increased. But in 1944 and 1945, when the airlines had to plan for the post-war fleets and organization to meet their public

responsibility for adequate transportation and their requirements for economic size, we were faced with expert estimates of a post-war passenger potential ranging from approximately 6 billion passenger miles to 25 billion passenger miles.

While, in our own case, we planned for a domestic industry reaching approximately 10 billion passenger miles in 1950 and developed a relatively conservative equipment program, we know that certain carriers placed orders for equipment which, if actually received and properly utilized, would have required at least a 25 billion passenger-mile industry. These equipment plans, many of which have been sharply curtailed in the last year, were altogether too often accompanied by grandiose plans for expansion of organization and personnel and by the development of palatial city ticket offices and other facilities. Plans for bigness have a way of breeding other plans for bigness. One airline ordering an excessive amount of equipment encourages its competitors to do likewise. For the transportation business is one in which the person with the most (even though it may be too much) gets the most. A palatial ticket office, developed on one busy downtown corner by one airline, encourages or even compels a competitor to build a more palatial office to attract customers and to perpetuate the reputation of air transportation.

This expansion, much of which has been warranted by the growth of the airlines, was accompanied in too many cases by a lack of organization and control to hold costs in line with actual expansion plans and the immediate outlook for traffic. I know of cases where the increase in personnel was so rapid that actual employment exceeded future budgets before it was found out how many persons were on the payroll. There have been other times when management attempted to solve the vexing problem of an expanding business by simply adding personnel rather than by solving the basic problem involved. This occurred, I feel sure, with reservations and ground-handling immediately after the war. The influx of passengers and the addition of plane miles so affected the airlines as to cause just public criticism, with the result that thousands of persons were added to the payrolls to handle a problem which revised methods and quality supervision have largely eliminated since.

The competitive fervor in the airline business near the end of the war and immediately after the war, led to flooding the Civil Aeronautics Board (CAB) with route applications. It nurtured the growth of an independent and confidential attitude by each airline on research and the development of facilities. Many route applications, we realize, have been made on a defensive basis, with companies filing for routes they really did not want but for which another company had applied and which, if granted, might impose a serious competitive threat. There have been many cases where independent research and the

development of facilities have been undertaken at the same time and on the same subject and for the same purpose by competitive airlines who could have saved considerable sums had these efforts been pooled. Some of this duplication of effort has even extended to the aircraft manufacturers and there have been cases where both airlines and manufacturers have been undertaking expensive research on instruments, heating and ventilating systems, loading devices, and many other technical developments connected with airline operation.

There has been virtually no combination of efforts with respect to market research, the results of which could easily have been shared by airlines and could have assisted airline management in developing a sound economic basis for future expansion. The competitive urge to keep up with, or get ahead of, "the Joneses" has resulted in some uneconomic scheduling of aircraft, with occasional unnecessary duplication of service. In this sphere of airline operations, like others, an individual airline, acting as an individual, is virtually compelled to keep up because those who offer the most tend to get the most.

I recognize that mistakes have been made by the airlines in not undertaking adequate financing for the tremendous expansion programs planned. There are clearly many reasons for this. The principal reason perhaps is that we under-estimated future increases in the costs of new facilities. For example, as late as 1944, TWA felt it was making a conservative estimate when it forecast the cost of acquiring Constellation equipment at $550,000 per airplane. But, these airplanes cost $800,000 when they were delivered early in 1946.

Another probable reason for this lack of financing is that we simply could not believe that as much money would be required as has turned out to be the case. In a few years, the gross assets of this country's scheduled airlines increased 500%. As a result, the financing programs required were so vast that they called for costly caution and delays for which the favorable financing markets of 1945 and early 1946 did not wait.

Another costly and needless error which can be laid to the door of airline management, is the unwise domestic passenger rate reductions made in 1943 and 1945, during which the average passenger revenue per passenger mile dropped by approximately 1¢ or 18%. Most of this drop occurred in 1945. Profits of the airlines in 1945 were soaring, and passengers were clamoring for airline seats. Clearly, with passenger load factors at 90%, there was no valid reason for lowering the fares and the possible excess profits tax cost to a few airlines of holding the fare level would have been more than offset by the desirability of building up financial reserves for the future and of saving passenger fare decreases until passenger loads should drop off or the future trend of airline costs should justify.

Factors Beyond Control of Airlines

This paradox of the airline business was due, in part, to certain factors beyond the control either of airline management or the government. In general, they are due to the fact that the airplane is perhaps man's most complex machine. And this complex machine engenders complex procedures for its maintenance, for passenger handling, for its operation, and even for accounting. I sometimes think that the airline business, because it is built around the complexities of the airplane, is the most complicated business of all.

The introduction of new airplanes of increasing complexity has cost the airlines of America tremendous sums of money, in addition to the cost of the airplanes themselves. The cash outlay for placing new aircraft into service cannot be absorbed over a long period of years. When it is realized that the DC-4 is estimated to be nearly 2½ times as complex as the DC-3 and the Constellation over 1½ times as complex as the DC-4, a program which involves placing such a complex machine into smooth, safe, and profitable operation involves many costs. In the case of TWA's Constellation aircraft, even though years had gone into the airplane's design and testing, and long months of careful planning have gone into the inauguration of service, the cost of introducing these airplanes was far beyond that which we had any reason to expect. During the year 1946 alone, we have estimated conservatively that the cost of introducing these and our international DC-4 airplanes was more than $8,000,000 and this figure is in addition to any costs for equipment or spare parts and to the fact that the Constellation grounding contributed approximately $7,000,000 to our net loss in that year.

Therefore, in one year alone, the introduction of new airplanes cost TWA, in loss of revenue not offset by cost reductions, and in non-recurring additional expenses, approximately $15,000,000, *in addition to the capital cost* of purchasing the airplanes and equiping the airline for their operation. It will be some time before the airlines operating the DC-6's can properly estimate the cost of inaugurating these airplanes, including the losses suffered by their grounding, although every airline in this country which inaugurated this new equipment in the post-war period has suffered considerably.

Another factor which has contributed to the airline paradox, and one which has interfered with most businesses in this country, is labor leadership. Altogether too often, loyal groups of employees are led into wasteful and harmful strikes, and costly make-work operating agreements by irresponsible or uninformed union leaders. It is a strange commentary on the American scene when a group of employees, such as airline pilots, earning upwards of $12,000 per year and working 80 hours per month, use their strategic position to cripple the business which makes possible their high salaries and to harm the

great majority of employees whose earnings average a quarter as much for twice the time.

There are, of course, many other factors beyond our executive control. We are still hampered by weather, operating delays, and the costs and confusions of off-schedule operations.

Our costs are still affected by shortages of various kinds. For the lack of an adequate supply of a particular type of bushing, for example, we have often been required to cannibalize a spare engine or an airplane to keep our overhaul shops producing a rate necessary for our operations. Nearly three years after V-J Day, these parts shortages increase our costs and keep us from the efficiencies which we know can be attained.

Perhaps the greatest single cause for the paradoxical situation of the airlines arises from the inflation of prices, particularly in the last few years. We have analyzed the effects of these increased prices on TWA. By taking the principal items of 1939 operating expenses and applying the cost per unit to our 1947 experience, we found some startling results.

The increases in the *rates* we pay for salaries and wages and the *prices* of materials and supplies, including gasoline and oil, account for almost $12,000,000 of our 1947 expenses. In other words, without inflation of prices, our $8,000,000 loss experienced in 1947 would have been a $4,000,000 profit, despite the fact that passenger rates were somewhat lower than in 1939, and mail pay was but a fraction of the 1939 rates per ton mile. A part of this inflation in prices can be laid to the disruptions of war. But a large part of it must be laid at the door of government policy which encouraged undue wage increases during and especially immediately after the war, and which also encouraged wasted funds through many unnecessary government expenditures.

This inflation of prices has largely nullified our efforts to improve efficiency. New and more efficient airplanes do not yield the profits anticipated because, by the time we have them in service, price increases have wiped out their advantages. Reduction in numbers of employees on our payrolls are offset by increased wages. Improved operating and maintenance techniques which yield savings measured in millions of dollars are offset by increases in the cost of gasoline and oil.

This merry-go-round of price increases which absorbs efficiency increases is intensified by the fact that the airlines are unable to pass much of the cost rise on to the public in higher passenger fares or higher express and freight rates. Passenger and cargo business is highly competitive, not only between airlines, but between airlines and surface carriers. No individual airline is master of its sales price. Even

though the airlines were not shackled with the Anti-Trust Laws and even though customers had no alternative but public air transportation, the competitiveness of this industry would still mean that price increases could not be passed on through higher rates. How different from the sheet steel business or the business of producing automobiles or underwear!

Mistakes in Governmental Policies

The dilemma presented by price increases is sharpened by the government attitude towards mail rates. At the very time post-war inflation was hitting the airlines, in 1945, the CAB reduced the service mail rate of the trunk-line carriers from 60¢ to 45¢ per ton mile. While mail pay has become a decreasingly small percentage of our gross revenue, amounting to 7% domestically in 1947, the fact that the trunk-line operators have been asked to carry mail at a 25% reduction in rate below the amount paid during the war despite higher prices and costs, is strange indeed. Had TWA received even the war-time service rate for the carrying of domestic air mail, its 1947 loss would have been reduced by $1,150,000; and had the 1939 air mail rate been applied to both domestic and international air mail carried in 1947, TWA would have earned a *profit* of $3,500,000, instead of incurring a *loss* of $8,000,000.

Our governmental air-mail policy is confused, unrealistic, and not in accordance with the dictates of the Civil Aeronautics Act of 1938. Few persons realize why domestic air-mail incurs costs far above those which are incurred for freight. Air mail is handled as a top priority load. A carrier is obliged to accept air mail, or risk fines, even if passengers are removed thereby. In order to protect themselves and to give the Post Office the service it needs, most airlines allocate space and weight for air-mail which cannot be sold in advance to passengers. This priority treatment is costly and justifies a service rate for mail well above the rate for passengers.

An interesting inconsistency in government policy arises in international air mail. If an American flag-carrier operating over the North Atlantic handles east-bound mail from the United States, it receives 75¢ per ton mile to the foreign gateways. If a foreign carrier handles the same kind of east-bound mail, it is paid $2.86 per ton mile. While American flag-carriers handle most of the east-bound mail, we have such startling paradoxes as the United States Government paying a foreign airline this attractive rate for flying thousands of ton miles of mail during a time when our own American Overseas Airline was shut down by a needless strike called by an American labor leader.

It has also seemed a little puzzling to me why the United States Government should place an inexperienced feeder-line operator into a local service and pay mail rates amounting to $20 to $100 per ton

mile, when a major airline like TWA is allowed only 45¢ per ton mile for carrying mail over the feeder-type portions of its route. Yet the major airline is generally in a position to give superior mail service.

The handling of air-mail rates has, to a very great extent, disregarded the clear dictates of Congressional intent in the Civil Aeronautics Act of 1938. In this Act, Congress clearly stated that the rates set for air-mail must reflect the need of each air carrier for compensation for the transportation of mail, sufficient to insure the performance of service under honest, economical, and efficient management as well as to maintain and continue the development of air transportation to an extent required for national commerce, the postal service, and national defense. The record speaks for itself. Not only has the service rate for the carriage of mail been below that required by the costs of rendering the service required and, in the international field, below that paid to the competitors of American flag-carriers, but the rate has been far below that required by the dictates of Congress itself.

Even though pending mail rate cases should allow an increase in the mail rate, much of the damage will have been done. The needs of the airlines for a sound credit standing for their development and expansion in this critical time is imperative and has unquestionably been harmed by the government attitude on the mail rate cases.

The delays in handling mail rate cases have been extremely costly. TWA, for example, applied for an increase in the domestic mail rate in March, 1947. More than a year later, our case, based upon an emergency situation growing out of conditions over which we had little or no control, was finally decided—within the past few days, but at a most disappointing figure. How different was this delay from the expenditious handling given to the mail rate reductions nearly three years ago.

Moreover, if the view of the CAB prevails—that no airline should be allowed back pay before the date of officially filing for an increase —then the losses due to such government actions as the grounding of the Constellations will not be reflected in mail pay. In this connection, no reading of the Civil Aeronautics Act or its amendments can lead to the conclusion that Congress intended the payment of back air-mail compensation to depend upon the day when the applicant filed for the rate.

As the President's Air Policy Commission has recognized, the development of the present domestic route pattern has been confused and has not been accomplished through the careful planning which the outlining of a national route pattern demands. Each case tends to be dealt with as it arises. By not having a definite long-range plan and by yielding to arguments which such a plan would show to be unsound, the CAB has developed a national route pattern replete with duplicating services and routes requiring considerable subsidy. The

spurious requests of every city for one-carrier trunk line service to every other city has altogether too often been met by adding a carrier to an already over-served route, rather than by looking for such alternatives as schedule connections and equipment interchange.

To be sure, some of this blame must fall on the airlines for their applications into territories where they cannot contribute additional and economic service. But much of it has grown out of the Board's insistence upon competition, often beyond that required to protect the public; the slowness with which the Board has acted on route development cases; its delay in establishing and enforcing rules for the control of non-certificated carriers; and, above all, the lack of a consistent plan for a national air route pattern.

Another field of government policy of considerable importance to the airlines is the program for the construction and modification of airports and airways facilities. Most of these are clearly required in the interests of national defense, and many are necessary if we are to obtain a dependable and efficient airline operating system. Most of these improvements are beyond the reach of any single airline, not only because of their expense, but because they are public facilities necessarily open to the use of private flyers, non-scheduled airlines, and military pilots. As a matter of fact, some of our largest airports are used less by the scheduled airlines than by others. In Kansas City, for the year 1947, only 27% of the total landings and take-offs were made by the scheduled airlines. Even at the crowded Chicago Municipal Airport, the scheduled airlines made only 64% of the total landings in 1947. The need for these facilities has been recognized for some time and stand materially in the way of attaining dependable operation. Yet, even though the Federal Airport Program was approved by Congress in 1946, rather little has been accomplished.

There are many other inconsistencies and confusions of government policy which could be mentioned. I have known of cases where one regional government administrator insisted upon us taking a course of action, with respect to the Constellations, that was different from the course of action of another administrator. There are confusing cases where the CAA has changed its mind two or three times in a short space of time on safety specifications, such as cabin linings, for example. For an industry necessarily as closely tied in with the government as the airline business, the confusion and chaos of government policy, from their effects upon price inflation to their effects upon safety modification of aircraft, are costly in terms of long-range planning as well as from the standpoint of daily operating expenses.

Proposals for Resolving Dilemma

I should be pessimistic indeed if I left with you the impression that the outlook for the airlines is hopeless. It would be a sad outlook if

we, in the airline business, felt we had to look forward to increasing our business and extending air travel to the air public only at increasing losses. Such an outlook would, of course, spell the end to private enterprise in the airline industry. I feel that there is much which can be done by the airlines themselves, their suppliers, their employees, and by state and federal governments. The rude awakening from the easy profits of war-time years and the recognition of the economic problems involved in the post-war period have already led to many actions designed to put the airlines on a sound footing. The main job of airline management today is to improve the quality and dependability of service, and to reduce costs. And by management I include every supervisor in the companies. We *must* improve the quality and dependability of airline service and at the same time we must reduce the capital costs of expansion and the costs of operating our businesses.

I feel certain that when we have done so, public opinion will force such changes in governmental policy that we cannot fail in becoming a sound and integral part of our nation's economic structure. This job on the part of management requires cost reduction through the development of efficient organization and methods of doing business and a cost-consciousness on the part of employees who see their economic security bound up with the efficient operation of their airline company.

Not only does this cost-reduction require this kind of effort on the part of each individual company and its employees, but there are many places where the airlines can reduce costs through the kind of cooperation designed to benefit the public. There has been much talk of consolidating ticket offices and ramp and airport facilities. There has been some action. The airlines are, as you know, undertaking two major experiments on consolidating airport operations at Cincinnati and at Willow Run.

The consolidation of many airport services and downtown ticket offices is still a relatively untouched field for savings. I fear that, in the past, we have attempted too often to look for these savings in the busy airport terminals of large cities where the service is highly competitive and the possibilities for savings small. Considerable possibility for savings does exist, however, in downtown ticket offices of cities large and small and in airport services at medium and small cities, especially where essentially non-competitive services are offered.

We still have a long way to go in sharing the results of technical and economic research. The recent mandatory fire prevention program of the CAB, which required airline operators to undertake considerable modification by May 1 of this year is a good case at point. Virtually no attempt was made between the airlines to agree on how the details of this work were to be accomplished, and engineering and maintenance departments of all the major carriers incurred duplicate

expenses in approaching this problem on an independent basis. Moreover, it is known that power-plant costs represented between 50% to 70% of all direct aircraft maintenance; yet there has been little concentrated effort by the airline industry to act as a group in handling necessary improvements and modification to such engines as the Wright 3350.

Another type of cooperation which may reduce costs is the pooling of maintenance and overhaul of such items as engines, instruments, and accessories. The record of pooled engine overhaul has not yet been impressive but there has not been to my knowledge, a single case where this overhaul was pooled on a large enough scale to make real economies possible.

A further field in which airline management can help in solving the strange airline paradox is through removing the pressure for duplicating route awards and facilities for extending through carrier service. I doubt whether Ball Bearing, Ohio, or Frozen Dog, Wyoming, would be so insistent on one-carrier service to every major point in the country if the airlines could better coordinate their schedules or interchange equipment as TWA is planning to do in cooperation with Delta Air Lines this spring.

On the part of the aircraft, engine, and parts manufacturers, the paradox of the airlines can be assisted materially by a number of important means. Too often transport airplanes have been designed as a fuselage with wings and power plants and later with a view to their adaptability for the carrying of passengers and cargo. I am glad to say that this fault is being corrected and that airlplanes of the future will probably be built without such drawbacks. However, as of today, with our so-called post-war airplanes, the preliminary approach to the initial design and development has been one of concentrating upon structure and aerodynamics. This has resulted in designing the airplane so that accessories and systems are forced to fit into a predetermined structure, causing thereby excessively high modification costs, maintenance costs, and mechanical delays.

The airplane of the future must be designed to avoid this costly mistake. It can be so designed if the airline industry will cooperate with the manufacturer in seeing that structure and aerodynamic design is made compatible with simple and dependable accessory and system design. If this kind of concept of design were accompanied by greater efforts toward standardization, I feel that great dividends in cost-saving and flexibility of operation would result. Airline individuality, with respect to cockpit arrangements, accessories, systems, loading devices, and other technical matters, are a costly luxury which I believe we could do away with. It may take a long time to realize results, but airline managements, even so, should prepare for this kind of cooperation now. The manufacturer can help us most at the present time by

taking a more active interest in the production of replacement parts. For, until we can have a smooth flow of parts needed for the overhaul of our aircraft and their power plants and accessories, we can hardly reduce our maintenance costs to the minimum.

Airline labor must recognize that its monetary rewards and economic security depend upon the success of the airline enterprise. This requires labor statesmanship of a high order, as well as an airline management which will effectively give the facts to its employees. I should hope that this labor leadership will not operate on a premise that an occasional strike is a good thing to keep management in line and labor union dues fully paid. I should rather hope that this labor leadership will develop responsibility and a knowledge of the fundamental economic axiom that no one wins from a strike, that no company can long pay wages beyond its ability, and that low cost production of airline service means high wages and steady employment.

Perhaps the greatest contribution to the development of a sound airline industry lies in government policy. This policy must be consistent within itself and over a period of time and must deal realistically with problems without requiring long, drawn-out and expensive hearings and disrupting delays. Over the long period of time, of course, the government can contribute most by making sure that its budgetary and monetary policies do not unduly disrupt the price level. A spiralling inflation of prices has already robbed the fruits of our efforts to increase efficiency. Further material rises in prices are likely to destroy the private enterprise existing in the airline business. This business, being highly competitive and selling a service so sensitive to price rises, cannot resort to the mere expedient of increasing prices each time the price of labor or materials rise. As I pointed out earlier, we cannot pass on labor and material cost increases as can most firms in mining, manufacturing, and retailing.

Government policy with respect to labor still leaves much to be desired. The recently enacted Taft-Hartley Law which removes some of the inequities of 14 years of pro-labor legislation does not apply to the airlines. The airlines, instead, still operate under a Railroad Labor Act which does not particularly suit the airline business and is certainly no answer to the proper government responsibility in airline labor difficulties.

Basic government policy dealing with the economic and safety regulations of the airlines, as this policy is expressed in the Acts of Congress, needs very little overhaul. What *is* needed is the removal of the chaos and the inconsistencies of the CAB in its interpretation of the clear-cut policies of the Civil Aeronautics Act of 1938.

This Act, at no point, requires the Board to develop an excessively competitive route pattern. This Act, contrary to its interpretation by the Board, does not require airlines to carry air-mail at the rates

imposed nor does it refuse assistance in the proper development of the airline business. This Act does not, in my judgment, hinder the healthy development of air-freight, and its proper interpretation would not permit a system where a few carriers can skim off the cream of the air-freight business by limiting their services to hauls between large traffic generating points.

What is clearly needed under the Civil Aeronautics Act is the recognition on the part of the Board responsible for its administration that (1) excessive competition is not necessary in a business so closely regulated as the airline industry; (2) a master plan for route development must be drawn if the chaos and expense of unduly duplicated services are to be avoided; (3) the national defense importance of the airlines and the expenses of their developmental period require a mail rate high enough to cover proper costs and occasionally a special allowance to cover exceptional costs forced on the airlines through no fault of their own; (4) decisions in the public interest do not require that each city should immediately be given a feeder line route whether it can be supported or not or that each city asking for one-carrier service should be given it if by so doing a sound airline system would not result; and (5) certain routes, particularly in the international field, having been granted primarily as a matter of international policy, should be given special financial support by the government.

The airline paradox of high traffic, high efficiency, and high losses is not inevitable for the future. By recognizing the problems involved and by attacking them head-on, whatever their causes may be, I feel sure that the airline business can develop into the position expected by its optimistic forecasters a few years ago.

But the solution of these problems *is* urgent. The airlines are relatively small in terms of total capital investment. The total capital of all American domestic and international carriers is smaller than the road and equipment account of a single large American railroad. The airlines have no considerable reserves from which to absorb development costs and finance expansion. In their entire 20 year history, the airlines of the United States have had only one good period of earnings — the years 1941-1945 — and high taxes did not permit the accumulation of reserves needed for post-war expansion.

I do not think I have over-emphasized the gravity of the problems besetting our industry. Our country became great by conquering one frontier after another. We advanced from the Atlantic Seaboard across the frontier of the Appalachian range to the fertile lands of Ohio, Indiana, and the middle west. We conquered the frontier of the Mississippi, the great Rocky Mountains, and went on to the Pacific until a continent was ours.

The crossing of these terrestrial frontiers was not easy. It required more than a century of a nation's effort. We cannot expect the cross-

ing of the remaining frontier — the air — to be easy. Yet, the amazing fact is that in 20 short years, the airline industry of the United States leads the world in air service. It carries passengers and cargo around the world and serves virtually every large city on the face of the globe. It brings to the people of the United States a greater volume of dependable and low cost air service than the airlines of any other nation. It has become a major force in the American transportation scene.

This astonishing fact has been accomplished despite untold operating difficulties, disappointing earnings, and business problems which seemed at the time to be beyond solution. This fact dramatizes the virility of an industry which has grown perhaps faster than any major industry in history. And it demonstrates how the Wright Brothers, Pop Hanshue, Jack Maddox, and the many others who have contributed to the progress of the airline industry are the Daniel Boones and John Fremonts of the air — the pioneers of the better world of tomorrow.

EDITORIAL

CONCEPT OF NATIONAL AVIATION POLICY FOR THE UNITED STATES

In the Spring issue of the JOURNAL the specific recommendations of the Congressional Aviation Policy Board concerning Civil Air Transport and Government Organization were set forth.[1] These recommendations are noteworthy in part because they follow from a searching analysis of the concepts that may best guide United States aviation policy in this post World War II era:

1. That the costs of the air-power program of the United States be coordinated with all other costs and expenditures of government, both domestic and foreign, that we may protect ourselves against both aggression from abroad and bankruptcy at home.

2. The military air power of the United States should be maintained at such effectiveness as to be able under all circumstances to control the air spaces of the United States, its possessions, Territories, bases, and occupied lands wheresoever, and be able to retaliate in greater degree for any attacks launched by air, or otherwise, against the peace and security of the United States or those free allied governments with which it is joined for mutual defense.

3. Scientific research should be fostered and coordinated to maintain the leadership of the United States in technical aeronautical development.

4. The airways, weather stations, airports, and essential facilities of air navigation and control should be developed and maintained to accomplish the maximum degree of safety and certainty in air commerce and military operation, regardless of weather, burden of traffic, enemy action, or other cause whatsoever.

5. The aviation industry of the United States should be maintained in such production status and degree of expandability as to serve adequately, and without delay in emergency, the requirements of the military air forces.

6. The domestic and foreign air commerce of the United States should be fostered and promoted by whatever means appear most practical until it reaches such stature in passenger and cargo capacity as to constitute in crisis an adequate logistical air arm of the National Defense Establishment.

7. The value of the small-business man — the local airport operator, aircraft sales and service companies, flying and trade schools — along with the private citizen pilot and owner of aircraft

[1] 15 J. Air L. & C. 208 (1948).

should be regarded as a national asset and be given every recognition and encouragement.

8. In every phase of national air power, the policy of coordination with every other phase should prevail, and the Secretaries of State, Defense, and Commerce must be specifically charged with responsibility to this end.

9. An aeronautical educational program should be established throughout the public-school system in order that basic problems of the air age — global geography, meteorology, navigation, mechanics, communications and the rudiments of flight — are well understood by future generations.[2]

These succinct statements of fundamental aviation policy follow from a most thorough examination of the overall position of the United States in 1948 in this emerging air age. The tragic plight of the world is forcibly presented in the Preface to the Report and must be carefully considered in evaluating the concepts recommended by the ten member Congressional Board of the 80th Congress.

> On August 6, 1945, an airplane bearing the insignia of the United States Army Air Forces dropped an atom bomb on Hiroshima. Militarily speaking, at that same hour the security frontiers of all nations disappeared from the map. National defense, in the traditional sense, is no longer possible. More devastating weapons and more competent weapon carriers than those which struck Hiroshima are in existence. The cycle of history has turned and once again civilization stands vulnerable to annihilation.
>
> Joint action for peace by all major nations alone can meet our modern dilemma. Determined and continuous effort in the United Nations must not be abandoned while the slightest ray of hope remains. In the meantime, an alternative plan to maintain a balance of peace must be contrived in the name of the free world.
>
> World War III, if it comes, will be in sudden and indiscriminate attack on our cities, our factories, our transportation lines, our communication centers and water supply, and more important than all else, upon our lives. It will be more extensive than the attack on Hiroshima. There will be no time, as in World War I and World War II, for mobilization. The only "defense" will be swift and more devastating retaliatory attack.
>
> To defend ourselves in the age of atomic bombs, of radioactive dust, of bacteriological contamination and guided missiles—to mention some of the new and terrible weapons—we must have air power that is supreme. We cannot have less if we are to discourage attack or, if attacked, to defend ourselves.
>
> Air power is the total ability of a nation to capitalize on the medium of flight. The ramifications of the air power we must have call for definition of political rights in air space. They require revaluation of international alliances. They overlay the traditional map of commerce with air trade routes. They profoundly influence the expenditure of national budgets. They presage the existence of a vast new industry.
>
> Considering these prospects, it is self-evident that search for a

[2] National Aviation Policy, Senate Rep. 949, 80th Cong. 2 sess. (1948), p. 5.

national air policy for the United States must range from telescopic to microscopic analysis. It must seek to explore all the facts. It must uncover them and it must coordinate them if a pattern of national security and civil progress is to result.

It is folly to pretend that the world does not live under a sense of impending tragedy. Deliberately and continuously we are faced with the possibility of aggressive attack. The deadly character of the new weapons makes war an open invitation to mass annihilation.

In view of the foregoing, the Congressional Board has sought to determine a broad national air policy which by coordination of all phases of air power will most discourage aggression, preserve the national security, and promote the total social and economic welfare of the United States.[3]

That national policy for civil and military aviation cannot be separated is emphasized throughout the nine concepts — all aircraft must use the same airspace, may use the same electronic navigation and communication facilities, do in fact use many for the same airports and have many common engineering features and all-weather flying problems. The foresight of the Congressional framers of the Civil Aeronautics Act of 1938 is shown by the injunction to the Civil Aeronautics Board (Authority) to consider the National Defense as well as the needs of commerce and the postal service in developing a civilian air transport system.[4]

E. C. S.

UNITED STATES MEMBERS OF THE ICAO LEGAL COMMITTEE

The Secretary of State, on June 11, 1948, announced the United States membership on the Legal Committee of the International Civil Aviation Organization. Appointment is for a period of not to exceed three years, subject to the discretion of the Secretary of State. Members are expected to participate in the work of the Legal Committee and to collaborate with the other United States members in the preparation and presentation of the United States position relative to international private air law.

Government Members:

Richard E. Elwell, General Counsel, Civil Aeronautics Administration, Department of Commerce.

Emory T. Nunneley, General Counsel, Civil Aeronautics Board.

Raymund T. Yingling, Assistant Legal Adviser for Military Affairs and Occupied Areas, Department of State.

---

[3] *Id.* at 3.
[4] Civil Aeronautics Act of 1938 §2, 52 stat., 49 USCA (Supp. 1947).

Non-Government Members:

John C. Cooper, The Institute for Advanced Study, Princeton, New Jersey.

Edward C. Sweeney, Professor of Law, Northwestern University, Chicago, Illinois.

Stuart G. Tipton, General Counsel, Air Transport Association of America.

Government Alternates:

R. P. Boyle, Assistant General Counsel, Civil Aeronautics Administration, Department of Commerce.

G. Nathan Calkins, Jr., Assistant General Counsel, Civil Aeronautics Board.

Stephen Latchford, Assistant to the Legal Adviser on Detail in Aviation Division, Department of State.

STATE AND LOCAL

Department Editor: Madeline C. Dinu*

NASAO ACTIVITIES

AT an executive session held in Washington the week of May 17, 1948, the NASAO carefully reviewed and analyzed the aviation bills introduced in the 80th Congress (57 Senate and 120 House). Statements were presented at hearings conducted on some of the bills; statements are being prepared for hearings to be conducted on others. H.R. 6147 and its companion bill S.B. 2452 dealing with State Enforcement of Federal Civil Air Regulations provoked the most discussion. Since the Federal Government is seeking the cooperation and assistance of the states in enforcing the Civil Air Regulations, greater coordination can only be had if the states contribute their practical experience to the legislative proposals which would accomplish this end.

This subject will continue to receive close study by NASAO. The statement presented by Colonel Clarence F. Cornish, President of NASAO, to the House Interstate and Foreign Commerce Committee on May 4, 1948, evidences NASAO's stand on the subject, and reads in part as follows:

"Statement of National Association of State Aviation Officials in Regard to H.R. 6147, 80th Congress, Second Session."

"The NASAO has long recognized that it is important from the standpoint of the public interest and for the safety and progress of aviation to provide more effective means of curbing reckless and unsafe flying practices. When the original proposal was made to the states by the CAB to secure enabling legislation empowering the states to enforce certain Civil Air Regulations, (CAR), NASAO initiated an exhaustive study to determine the position of the states relative to this important matter. The study was completed in time for presentation to the National Convention of the NASAO in October of 1947 and assisted the convention in arriving at certain conclusions and findings. It was determined that to a great extent, the basic tools had been made available to accomplish the purposes of the proposed amendment to Title VI of the Civil Aeronautics Act of 1938 as amended.

"The Uniform Aeronautics Commission Act, fostered by the NASAO and befriended by the CAB and the CAA, has within its provisions, the powers to promote a safe flying program at the state level. It provides for: (1) Registration of airmen and aircraft; (2) A reckless flying law; and (3) Adoption of rules and regulations, using the Federal rules and regulations as a standard. Many states have embarked upon a formal program using all of the above named provisions to bring about a curbing of reckless flying. Their programs have included formal training of State Police as well as other enforcement agencies of the state in the subject of state aviation law enforcement. Safety programs designed to bring about respect for safe flying practices have also been inaugurated.

"The reckless flying laws of the various states which have followed Section 13 of the uniform act are so designed as to present an immediate deterrent to the flagrant violator, easily enforceable by local enforcement

* Legal Counsel to NASAO and Spec. Ass't Att'y Gen. for Aviation in Mich.

agencies. Many states, enabled by statutory authority to adopt rules and regulations, and having the Federal rules and regulations as a standard, have adopted reckless flying rules, and in so doing, have aided in the trend toward uniformity, and at the same time made possible the added advantage of direct local enforcement.

"The NASAO study, therefore, concluded that a great portion of the machinery had been made available and was in use on a uniform basis throughout the several states for the maintenance of a program against reckless flying. Nevertheless, it appeared that even though adequate facilities were available at the state level for the enforcement of reckless flying laws already in operation in many states, the safe flying programs of the various states could be strengthened appreciably should the states be given power to reach the Federal airman certificates of violators. The association, having made this observation, formally resolved that its officials should confer with officials of the CAA and the CAB for the purpose of drafting and supporting an amendment to the Civil Aeronautics Act of 1938 which, after affording the holder procedural due process, would permit state courts and state aviation agencies to suspend or revoke for a limited period the Federal airman certificate of any violator of Federal laws or regulations designed to prohibit reckless or unsafe flying.

"We recognize and appreciate the great and growing administrative burden on the Federal Government in enforcing its own Civil Air Regulations, violation of which is becoming day by day a problem of increasing local concern since violation of our own state reckless flying laws and other aeronautical laws are so closely related with violation of the Federal rules. The impracticability of efficient Federal enforcement of C. A. R.s has been recognized by the aviation industry as witnessed by Bill No. 20-A, passed at the 1947 National Aviation Clinic, the recommendations of both the President's Air Policy Commission and the Congressional Aviation Policy Board.

"The complexity and intricacy of Federal procedural regulation required for the administration and enforcement of C. A. R. by the Federal Government, as now exercised, multiplied by the constantly increasing size and complexity of the aviation industry will require an ever increasing Federal personnel and a constant demand for larger Federal appropriation. The Federal authorities and the bill under consideration both admit the inability of the Federal Government to enforce the Civil Air Regulations in the personal plane field. This field, according to authoritative statistics, comprises 85% of all air activity in the United States. H.R. 6147 proposes that the states assume the function of enforcing Civil Air Regulations in the non-air carrier field. The NASAO, recognizing the state's responsibility in this area of regulation, stated in its statement to the Congressional Aviation Policy Board of February 9th, 1948, that 'The states should be empowered to enforce the Civil Air Regulations of the Federal Government, including the right to suspend or revoke airman certificates.' This organization, however, has indicated its support to this proposal only to the extent that such legislation will be permissive and not mandatory in nature, leaving final individual state acceptance of that particular enforcement feature dependent on constitutionality and state policy.

"As we interpret H.R. 6147, it contains three separate distinct and not necessarily related purposes. Sections 1 and 2 of the bill provide for the extension of Federal jurisdiction beyond the field of interstate commerce and changes the entire concept of Federal jurisdiction in the field of aviation. Section 3 provides for the enforcement of Federal air traffic regulations by the states and section 4 would make Federal regulation of air traffic exclusive. It is the substance of certain far reaching sections of

the proposed bill, and not particularly section 3, which NASAO considers as seriously objectionable and transcend the scope of the basic principle of state enforcement as contemplated and understood by NASAO when the original proposal for state enforcement was tendered by representatives of the CAB.

"Objections to H.R. 6147 are outlined specifically as follows:

"1. The bill would redefine the term 'air commerce' in the Civil Aeronautics Act of 1938 by substituting in lieu thereof the words 'air navigation' and give that term so broad a definition as to include every use of aircraft, whether upon the ground or in the air, whether intrastate or interstate, whether local or national in its effect, and whether or not it is feasible for the Federal Government to exercise effective regulation. 'Air navigation' would be defined as the operation or navigation of aircraft (a) upon any airport in the United States or in the airspace over the United States, or (b) to or from any place in the United States whether or not through the airspace over the United States. The concept of correlative state and Federal functions in the field is abandoned completely. By virtue of this amendatory stroke, the entire field of regulation of flight operations would be pre-empted by the Federal Government. The old term 'air commerce,' which would be replaced by the new and broader term, is defined in Section 1, paragraph 3 of the Civil Aeronautics Act. Such definition in conjunction with the definition of the term interstate, overseas or foreign air commerce contained in paragraph 20 of section 1 outlines a field of jurisdiction which includes the following: (a) interstate and foreign carriage by aircraft of persons or property for compensation or hire, (b) carriage of mail by aircraft, (c) interstate or foreign operation or navigation of aircraft in the conduct or furtherance of a business or vocation, (d) operation of aircraft within the limits of any civil airway, (e) any operation or navigation of aircraft which directly affects or which may endanger safety in interstate, overseas or foreign commerce. It is noted that through this definition Congress extended Federal jurisdiction in regard to the powers of the CAA over air safety to the full limit believed in 1938 to be constitutional. Only those operations of a purely local nature which could in nowise affect interstate or foreign commerce were omitted from the purview of the CAA's authority.

"2. Section 611(b) of the Civil Aeronautics Act as it would be amended by the proposed bill provides for the collection of civil penalties by a proceeding in a state court arising out of the violation of a Civil Air Regulation which penalty shall be paid to the state. This requirement necessitates running the gauntlet of legal civil procedures to secure a judgment, before the civil penalty is collected. Civil proceedings are inherently slower in arriving at a conclusion and serve as a far less deterrent and are less effective than the present state procedures of criminal prosecutions. A civil action commenced today on a busy metropolitan docket would have little chance of being tried in little less time than it takes at present to arrive at a determination and conclusion of a case involving violations of Civil Air Regulations before the Civil Aeronautics Board. The substitution of civil proceedings for the CAB proceedings now presently employed could well serve as a repetition and perpetuation of the CAA's present enforcement predicament.

"3. Subsection (d) of amended section 611 provides that the CAB by regulation shall from time to time designate which of the regulations a state may enforce. The proposed legislation offers no indication as to how narrow these regulations might be made, possibly reserving to federal enforcement the major portion of their rules and possibly leaving the states helplessly restricted.

"4. Subsection (g) of proposed section 611 requires that when a proceeding is commenced at the state level a copy of the complaint or other documents initiating such action shall be filed with the CAB by the official bringing such action or proceedings, and a copy of any judgment or final order or decree issued in any such action or proceeding shall also be filed with the Board by the appropriate state official. This procedure is obviously cumbersome and unworkable in practical application.

"5. *Section 4 of H.R. 6147 provides that 'no state, territory or possession of the United States, or political subdivision thereof shall without the consent of Congress impose upon any person any prohibition or requirement which relates to the same subject matter as any provision of Title VI of this act.'* Should this section be permitted to become law, the states could be forced to forfeit the right to register airmen and aircraft, certificate flying institutions, certificate intrastate air carriers, etc. When the term 'air navigation' is substituted for 'air commerce' it is readily noted that section 601 (a) of the 1938 Act, if amended as proposed, would create an exclusive Federal jurisdiction over aeronautical activities heretofore determined to be within the realm of the states.

"6. The proposed bill does not provide a state voice in the promulgation of rules and regulations to be enforced for the Federal Government in a sphere of activity wherein the state responsibility and jurisdiction has not yet been denied, and, if attempted, may raise the question of constitutionality.

"This Association presented its recommendations to the Congressional Aviation Policy Board and therein outlined its concept of the function of the states and the Federal Government in the field of aviation.

> *'The States Should Be Empowered to Enforce the Civil Air Regulations of the Federal Government Including the Right to Suspend or Revoke Airmen's Certificates.* This can only be accomplished by Congressional legislation. The impracticability of efficient federal enforcement of Civil Air Regulations has been recognized by the aviation industry, as witness by Bill No. 20-A passed at the last National Aviation Clinic, and the recommendation of the President's Air Policy Commission on page 126 of their report. However, a state should not be empowered to take away the right to fly of a resident of another state. The methods and details to be incorporated in this lgislation should be carefully developed by close cooperation between Congressional and state agencies, and methods of attaining uniformity of state legislation should be explored at the same time.
>
> 'Also as stated in our first recommendation, the states should have a greater voice in the promulgation of regulations they are being asked to enforce.'

"This offer of cooperation between the states and the Federal Governmental agencies has apparently been ignored. H.R. 6147 has been drafted and presented without consultation or conference with those who will be required to exercise those responsibilities. As a result, administrative difficulties of great magnitude will be found in the bill. Questions of venue and jurisdiction of proceedings in state courts and administrative agencies are completely overlooked. Accommodational procedure to state administrative and judicial systems has been ignored. Consequently the bill, as presently written, is not acceptable to the NASAO.

"Therefore, the National Association of State Aviation Officials, for reasons herein set forth makes the following recommendations: (1) That H.R. 6147 be not favorably reported by the Committee on Interstate and Foreign Commerce, and (2) That a cooperative effort be initiated by both Federal and state aeronautical agencies to draft a mutually acceptable bill which will enable permissive state actions to suspend or revoke Federal Airman certificates."

That enforcement problems daily are confronting the states in greater numbers is a known fact to those who are beleaguered by irate citizens. Questions of jurisdiction or of legal philosophies are of no concern to persons who have had their property damaged, or been bereaved by unlawful flying. They demand that something be done by their nearest law enforcing agency. The state aviation agencies have, consequently, been forced to adopt whatever practical and effective measures they can summon, within the framework of existing empowerment.

A concise statement of policy and procedure dealing with this subject was adopted by the Aeronautics Commission of New Hampshire on April 5, 1948. From its excellent coverage of the basic factors, and the results attained, persons who are responsible for recommending and drafting federal legislation, can well realize the need for state contribution to and participation in the formulating of any coordinate uniform plan incorporated in legislation on enforcement. The New Hampshire statement follows:

"POLICY AND PROCEDURE—LAW ENFORCEMENT, ACCIDENT PREVENTION AND INVESTIGATION

A—Provisions of Law

"*State Registration.* The law empowers the Commission to issue State Registration Certificates for aircraft, airmen and landing areas and makes it a violation of the law to operate or authorize the operation of aircraft without an appropriate Federal Certificate and, if a resident, a State Registration Certificate. Such certificates are also required for non-resident aircraft and airmen operating in air commerce within the State (intrastate operation). Any landing area established and marked as such is required by law to be registered with the Commission.

"*Regulations.* The necessary uniformity in rules and regulations governing the operation of aircraft is effected by the requirement of the New Hampshire Law which empowers the Commission to make rules and regulations *not inconsistent with* 'the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder.' Under this authority the Commission has adopted as 'Air Traffic Rules' all of Part 60 of the CAR and the pertinent sections of Parts 20 and 43 of the CAR. The Commission makes and amends the State regulations as the Federal regulations change.

B—Prosecution of Violations

"*Criminal Prosecution.* It is the policy of the Commission that violations of the law or the regulations be handled by the courts of the State in a manner similar to all other violations of State law or regulations. This provides prompt and effective action. Regarding violations by non-residents there has not yet been an instance when the violator has failed to return to this State to stand trial. This is accomplished by notification through the State Police or through local police that charges are pending.

"*Administrative Action.* This is taken only rarely and when circumstances require that it be taken. The law empowers the Commission to suspend or revoke state registration certificates for various reasons, including conviction of violation of the Federal law or rules or regulations.

C—Accident Prevention

"*Field Rules.* These are required by regulations of the Commission which also require the establishment of practice areas. As a result of many years of effort toward uniformity in this matter Uniform Field Rules have been generally agreed upon for all the landing areas in the State. It is expected there will be few, if any, deviations from these rules and they have already been adopted for 32 landing areas.

"*Inspection and Education.* A continuing program of inspection and education with aggressive action in the prosecution of careless and reckless airmen is conducted as an accident prevention measure.

"*Accident Investigation.* A complete investigation is made of all aircraft accidents, always with complete coordination and cooperation with the CAA District office.

D—Exchange of Information

"Reports of investigations of accidents and reports of action taken in the case of violations are filed with the CAA District office and, in the case of non-residents, with the State Aviation Agency of the home state.

E—Plan for Coordinated Action by States

"*State Registration.* The issuance of State Registration Certificates for aircraft, airmen and landing areas is fundamental to the control and regulation of aircraft operation. The State of New Hampshire appears to have ample authority to exercise such control and in the manner described above. Presumably other states have similar power. The amount of fees charged for such certificates seems to be a matter for each individual state to determine and they should be reasonable in any case. (Aircraft in New Hampshire are not subject to personal property tax and therefore no reduction in the aircraft fee is contemplated.)

"*Apprehension of Violators.* The use of the teletype and radio communications systems of the law enforcement agencies are very effective in identifying and apprehending violators. If the registration files of aircraft and airmen are readily available in all states, the use of these communication facilities will expedite the apprehension of violators from the identification of aircraft in flight.

"*Suspension and Revocation by State Agencies.* Legislative action empowering a state aviation agency to suspend or revoke a state certificate provides all the control needed *provided* that the agency can take this action upon conviction of a *serious* violation of the law or rules or regulations of another state. Authority to take this action is similar to the power now delegated to agencies charged with the regulation of the operation of motor vehicles.

"*Exchange of Information.* As outlined in 'D' above, the procedure provides the Federal and State agencies with all necessary information.

F—New Legislation Proposed in New Hampshire

"The New Hampshire Aeronautics Commission plans to recommend to the next legislature that the section of the law pertaining to *Suspension or Revocation* be amended to read as follows: 'A State Registration Certificate may be suspended or revoked if the holder thereof:—

"'II. Is convicted of a violation of federal law or rules or regulations, *or the law or regulations of another state,* relating to civil aeronautics.'—The above is the only change needed in the law to empower this Commission to carry out the program outlined above.

G—Ultimate Plan of Registration

"*Coordination With Federal Agency.* Were all states to require registration of aircraft and airmen, it is conceivable that, with the cooperation of the Federal agency concerned, the application for Federal registration of aircraft and certification of airmen could be accomplished through the CAA District offices. From the District office the applications can be routed through the office of the state agency for state registration, then on to Washington and if necessary returned through the same channels. Not until some such procedure is established and in operation will adequate, up-to-date information be available on all aircraft and airmen in the United States. Such a procedure will give the states all the data required and will still maintain the central files in Washington. If the Federal agencies want the States to take over law enforcement and certain phases of aircraft accident investigation, it is fundamental that certain basic data be made available to the state agencies. Registration at the state level provides the basic data required."

M. C. D.

FEDERAL

TRENDS IN STATE AVIATION LEGISLATION

By Office of General Counsel, Civil Aeronautics Administration*

Background of Federal-State Cooperation

FOLLOWING a series of conferences with representatives of the National Association of State Aviation Officers, the Administrator of Civil Aeronautics in February 1946 established a cooperative program for air safety enforcement by the federal agencies and the states.[1] In the furtherance of this program the Civil Aeronautics Administration and the NASAO agreed upon uniform state statutes prohibiting careless and reckless operation of aircraft and requiring federal airmen and airworthiness certificates.

In order to present a picture of the program which has been made as a result of this Federal-State Aviation Cooperative Program and related matters, two charts have been prepared. The first chart tabulates state laws pertaining to state aviation organizational and enforcement activities. The second chart tabulates state aviation tax laws and laws applicable to the establishment and operation of airports. These charts serve as an index in determining the progress of the Federal-State Cooperative Program.

Trends as Indicated by Charts

Enforcement Activities

As a first step towards federal-state cooperation, it is desirable that state aeronautics agencies be given the responsibility of promoting civil aviation in the state and coordinating with the CAA enforcement of the state aeronautical safety laws.[2] Chart number one reveals that all but two states have created a civil aeronautics agency and that most of them have set up a department or commission as provided by the model act. 38 states compensate their directors or secretaries, and 17 compensate the members of the aeronautics authority as well. The state agencies have entered four fields: Safety and Enforcement; National Airport Program; National Flight Training Program; Greater Liaison and Coordination between Federal and State Agencies affecting Aviation.[3] In the field of Safety many state governments have adopted Section 13 of the Uniform State Aeronautics Act or a statute which contains a similar provision. This section of the uniform state act prohibits careless and reckless operation of aircraft and specifies that the federal civil air regulations shall be used as a standard in determining what constitutes careless and reckless operation.

The states adopting the single safety standard—the civil air regulations promulgated by the Federal Government—are shown on chart number one. This tabulation indicates the progress of the federal-state program in preventing multiple conflicting state laws affecting civil aviation. Such multiple laws would inevitably result in confusion and misunderstanding on the part of pilots and others connected with the civil aviation industry. The chart also shows an extensive use of the CAA program of training of state enforcement personnel.

---

* Research and analysis by Marshall I. Stewart and Dent D. Dalby.

[1] See Elwell, Enforcement of Air Safety Regulations, 14 J. Air L. & C. 318, 330 (1947).

[2] Suggested State Legislation Program for 1947, p. 1.

[3] See, Madeline C. Dinu, *NASAO Activities*, 15 J. Air L. & C. 206 (1948).

STATE LEGISLATION PERTAINING TO THE REGULATION AND ENFORCEMENT OF CIVIL AVIATION

CHART ONE—June 1, 1948

	Recap.	Ala.	Ariz.	Ark.	Cal.	Colo.	Conn.	Del.	Fla.	Ga.	Idaho	Ill.	Ind.	Iowa	Kan.	Ky.	La.	Maine	Md.	Mass.	Mich.	Minn.	Miss.	Mo.	Mont.	Neb.	Nev.	N. H.	N. J.	N. M.	N. Y.	N. C.	N. D.	Ohio	Okla.	Ore.	Pa.	R. I.	S. C.	S. D.	Tenn.	Texas	Utah	Vt.	Va.	Wash.	W. Va.	Wis.	Wyo.
Aeronautics Body																																																		
Department	10	×		×		×	×					×	×				×					×	×				×																								
Commission	31	×			×	×	×	×						×	×				×	×	×	×		×		×	×		×	×	×		×	×		×		×		×	×	×	×	×	×	×	×	×	×	×
Other	12								×	×						5 ×	×								×							×			×		×	×	×					10 ×						
None	2		×																								×																							
Expense of Aeronautics Body (2)																																																		
Compensation to Members	17	×			×								×	×		×				×	×	×	×		×							×		×	9 ×	×						×						
Compensation to Director or Secretary	38	×		×	×	×	×	×	×		×	×	×	×	×		×	×	×	×	×		×		×	×		×	×			×		×	×	×	×		×	×		×	×	×	×	×	×	×	×
State Registration or License Required																																																	
Aircraft	26						×	×	×		×	×		×		3 ×	3 ×	×	×	×	×	×	12 ×		3 ×	×		×	1 ×				×		3 ×	×				3 ×	×			1 ×	×	×				
Airmen	24						×	×			×	×		×		3 ×	3 ×	×	×	×		×	12 ×		3 ×	×		×	1 ×				×		3 ×	×				3 ×	×			1 ×	×	×				
Air Schools (Instructors)	17							×				×		×		3 ×			×		×	×	12 ×		×	×		×	1 ×				×							×	×			1 ×	×		×			
Airports	30	×		×	×		×	×	×		4 ×			×		3 ×	×		×	×	×	×	12 ×		3 ×	×		×	×				×					×	×		×	×	×		×	×	×	×			
Federal Certification Required																																																	
Aircraft	45	×	×	×	×	×	×	×	×	×	×	×	×	×		×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×		×	×	×	×	×	×	×	×	×	×	×	×	×
Airmen	46	×	×	×	×	×	×	×	×	×	×	×	×	×		×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×
Air Schools (Instructors)	20	×			11 ×		×	×				×					×		×	7 ×		12 ×	×		×	×	×	×		7 ×						×	×					×	×			×			
Legislation Governing Flight																																																	
Reckless Flying Prohibition (Sec. 13, Uniform State Aeronautics Act)	18	×			×	×					×		×	×								×	12 ×				×		×				×	×	×				×	×				×	×	×			
Low Altitude Flight Prohibition	24		×	×		×	×	×		×			×							×	×	×	×	12 ×	×						×	×	×	×	×		×			×	×		×	×		×	×		
Flight Under Influence of Liquor, etc.	24			×		×	×					×	×				×			×	×	×	×	12 ×					×		×	×	×	×	×	×	×			×	×		×	×		×	×		
Other	27	×	×				×	×				×	×		6 ×		×			×		×	×		×	×	×		×	×		×	×	×		×			×	×	×		×	×			×	×
None	7								×								×							×							×						×							×					
	Recap.	Ala.	Ariz.	Ark.	Cal.	Colo.	Conn.	Del.	Fla.	Ga.	Idaho	Ill.	Ind.	Iowa	Kan.	Ky.	La.	Maine	Md.	Mass.	Mich.	Minn.	Miss.	Mo.	Mont.	Neb.	Nev.	N. H.	N. J.	N. M.	N. Y.	N. C.	N. D.	Ohio	Okla.	Ore.	Pa.	R. I.	S. C.	S. D.	Tenn.	Texas	Utah	Vt.	Va.	Wash.	W. Va.	Wis.	Wyo.

Fostering Civil Aviation	Recap.	Ala.	Ariz.	Ark.	Cal.	Colo.	Conn.	Del.	Fla.	Ga.	Idaho	Ill.	Ind.	Iowa	Kan.	Ky.	La.	Maine	Md.	Mass.	Mich.	Minn.	Miss.	Mo.	Mont.	Neb.	Nev.	N. H.	N. J.	N. M.	N. Y.	N. C.	N. D.	Ohio	Okla.	Ore.	Pa.	R. I.	S. C.	S. D.	Tenn.	Texas	Utah	Vt.	Va.	Wash.	W. Va.	Wis.	Wyo.
	42	×		×	×	×	×	×	×		×	×	×	×	×		×	×	×	×	×	×	×	×	×	×		×	×	×	×	×	×	×	×	×	×	×	×	×			×	×	×	×	×	×	×
Violation Enforcement																																																
State Violation Enforcement	23				×		×	×				×		×				×	×	×	×	×			×			×	×		×		×	×	×		×	×	×				×		×			
Co-operation with Federal Government	30				×	×	×	×			×	×	×	×		×		×	×	×	×	×	×		×	×		×	×		×		×	×	×	×	×	×					×	×	×	×		
Violation Enforcement Officers																																																
Special Aviation Police	12	×			×	×	×					×		×						×	×					×												×					×					×
State Police	34	×		×	×		×	×			×	×	×				×	×	×		×		12 ×	×	×	×	×	×	×		×	×	×	×	×	×	×	×	×	×	×		×	×		×	×	
County Police	33	×		×	×	×		×			×	×					×	×	×		×	×	12 ×	×	×	×	×	×	×		×	×	×		×	×	×		×	×			×	×		×	×	×
Municipal Police	33	×		×	×	×	×	×			×	×					×	×	×		×	×	12 ×		×	×	×	×	×		×	×	×		×	×	×	×	×	×			×	×		×	×	×
None	7		×						×	×					×	×														×												×							
Training of Enforcement Personnel																																																
Regular	1												×																																				
Periodic	14						×				×						×	×	×	×	×				×						×		×	×		×					×							
Prospective	14			×		×						×	×					×				×						×	×						×			×		×				×		×	×		
Accident Investigation (13)																																																
State Accident Investigation	24			×	×		×					×						×	×	×	×	×			×	×		×	×		8 ×		×	×	×		×	×	×	×			×		×			
Co-operation with Federal Government	26				×		×				×	×	×			×	×	×		×	×	×	12 ×		×	×		×	×		×		×	×	×		×	×					×	×	×	×		

1—All aircraft and airmen not licensed by U. S. must be licensed by State.

2—Per diem allowance is provided for members but no salary.

3—Ae onautics body is empowered to require registration of aircraft, airmen, air schools, and airports.

4—For public use only.

5—Division of Aeronautics is within Kansas Industrial Development Commission.

6—Compliance with Federal Regulations is required.

7—Required of G. I. Schools only.

8—To determine whether state law has been violated.

9—Traveling expense reimbursement plus per diem while attending meetings of Aviation Commissions.

10—Division of Aeronautics is within State Corporation Commission.

11—Instructors only, air schools not required to be certified.

12—Legislation is effective July 1, 1948.

13—Under broad or specific legislation aeronautics body is empowered to investigate state accidents and co-operate with Federal Government.

STATE LEGISLATION PERTAINING TO AIRPORT DEVELOPMENT AND FUEL TAXES

CHART TWO—June 1, 1948

	Recap.	Ala.	Ariz.	Ark.	Cal.	Colo.	Conn.	Del.	Fla.	Ga.	Idaho	Ill.	Ind.	Iowa	Kan.	Ky.	La.*	Maine	Md.	Mass.	Mich.	Minn.	Miss.	Mo.	Mont.	Neb.	Nev.	N. H.	N. J.*	N. M.	N. Y.	N. C.	N. D.	Ohio	Okla.	Ore.	Pa.	R. I.*	S. C.	S. D.	Tenn.	Texas	Utah	Vt.	Va.	Wash	W. Va.	Wis.	Wyo.
Authority to Construct, Operate, and Maintain Airports																																																
Aeronautics Body	33	×	2 ×		×	×	×	×	35	6 ×	×	×	9 ×	×		×	13 ×	×	×	×	×	×			×	×		×		36					×	×	23 ×	×		×		×		×	×	×	31 ×
County	43	×	×		×	×		×	×	×	×	×	×	×	11 ×	×	×	×	×	×	×	×	×	×	×	×	×		×	×	×	×	×	×	×		×	×	×	×	×		×	×	×	×	×
Municipality	46	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×	×		×	×	×	×	×	×	×	24	×	×	×	×	×	×	×	×	×	×	×
Federal-Aid Airport Program																																															
State Approval of Project	23						×					×	×	×				×	×	×	×	×			×	×		×	×		×					×	×			26 ×		×	×	37 ×		×	×	×
State Channeling of Funds																																															
Mandatory	21						×					7 ×	×			×			15 ×	×	×	×				×		×	×		5 ×					×	×			×	26 ×		27 ×	×	37 ×		×	×	
Voluntary	17	×	×		×	×		×			×			×			×						×		×							20 ×	×	×	×	×									×		
State Supervision of Construction																																															
Mandatory	7											8 ×								×		×				8 ×										×	×									×		
Voluntary	9	×			×	×	×	×				×		×							×																							×				
State Technical Aid 29	33	×			×	×	×	×	×		×	×	×	×		×	×		×	×	×	×	■	×	×	×		×		×		×	×	×	×	×		×	×		×	×		×	×	×	
Airport Zoning																																															
Patterned on a Model Act	29	■	×	■	■		■	■	×	×		×		×	×	×	×	×	×	×	■	×		×		×	×	×	×		×		×	×		×	×	×	×		×	×	×	×	×			
Not Patterned on a Model Act	10	×		×			×					×		×							×		×									×														×	×
No Specific Legislation	9				×	×		×																×						×				×					×						×		
State Aviation Fuel Taxes																																															
Levied as Motor Fuel Tax	44	1 6	5	6½	4½	6	4	4	7	6		3	4	4	4	7	7	6	5	3			6	2	5	5	33 4		36 3	5	4	6	4	4	5½	5	4	36 4	6	4	7	4	4	4½	6	5	5	4	4
Levied as Aviation Fuel Tax	4										2½										3	4						4																				
Used for Aeronautical Purposes	16	×									×							4			×				1	2½		×								1	×		×	×	×		×	34 ×	4				×
Full Refund to Purchaser	22			×		×	38 ×	×	×				×	10 ×	×		×			41 ×	×			×		22 ×	×		×	19 ×	×		×					×				×				30 ×	×	
Partial Refund or Exemption to Purchaser	12														12 3	40 ×		2			16 1½	17 ×	18 5		4	2½										4					25 ×					28 2			32 ×
Full Exemption from Tax	10			41 ×						39 ×	4 ×			10 ×			14 ×		41 ×												21 ×		×	×													

Bold Face Figures indicate cents.

1—State levy; some counties also authorized to tax; municipalities may tax under general licensing law.

2—State Land Commissioner.

3—Cities of first and second classes and incorporated towns.

4—Exemption only when gasoline is purchased outside state, stored in the state and withdrawn for use.

5—Port of New York Authority may receive aid directly from Federal Government.

6—State Highway Board.

7—Does not apply to cities over 500,000 population (Chicago). (Legislation effective July 1, 1948).

8—If state contributes funds to project.

9—State Highway Commission.

10—Airport operators engaged in selling aviation fuel required to obtain permits to purchase tax-free fuel. Consumers of aviation fuel which was not purchased tax free are entitled to refund.

11—Counties may join in the construction, operation, and maintenance of airports.

12—Purchases in quantities of forty or more gallons used for purposes other than operating motor vehicles on public highway exempt to extent of 3¢ per gal. if exemption permit obtained by manager or chief officer of airport.

13—Department of Public Works.

14—Bonded certificated air carriers may purchase fuel tax exempt from bonded dealer.

15—Municipality exempt if its aviation commission or authority was in existence prior to passage of Channeling Act.

16—Refund of 1½¢ per gal. to airlines operating interstate scheduled flights.

17—Refund to a maximum of 3½¢ per gal. made according to a graduated scale.

18—Refund of 5¢ per gal.; exemption permits may be obtained by operators or owners of licensed airports.

19—Refund if quantities are 50 gals or more at any one purchase.

20—If required by Federal Government or agency.

21—Commissioner of Revenue may relieve distributor from payment of tax on fuel used exclusively in aircraft motors.

22—Full refund of 5¢ allowed licensed air schools.

23—Department of Public Works.

24—State, rather than municipalities, constructs, operates and maintains airports.

25—Refund to a maximum of 2¢ per gal. made according to a graduated scale.

26—If sponsor presently maintains larger than Class 3 airport, state approval and state channeling of funds not necessary.

27—Municipalities may negotiate directly with Federal Government if state funds are not to be used.

28—Full refund on gasoline purchased within the state and consumed outside state; refund of 2¢ per gal. on gasoline purchased within the state and consumed in flight over state.

29—Under broad or specific power.

30—Refund if quantities are 25 gals. or more.

31—State Highway Department.

32—Refund of 2¢ per gal. on purchases in excess of 10,000 gals. per month.

33—Additional 1½¢ per gal. optional county gasoline tax is subject to the same non-highway use refund as the 4¢ per gal. tax.

34—In the amount of $2,000 annually.

35—Authority vested in State Improvement Commission.

36—Authority vested in State Highway Commission.

37—If project application was made or negotiations started before April 1, 1948 channeling is voluntary and approval not necessary.

38—Purchaser must secure an annual permit.

39—Motor fuel testing 78 octane or higher for exclusive use in aircraft motors exempt.

40—95% refundable to commercial operators.

41—Gasoline used for propelling aircraft is exempt from motor fuel tax if proper proof of such intended use is shown.

*Legislation concerning aviation fuel taxation pending.

The Federal Aid Airport Program

Chart number two discloses an extensive federal-state cooperation in the Federal Aid Airport Program. This program has encouraged the creation of state and local authority to construct, operate, and maintain airports. The sponsored legislation permits the states to participate fully in the Federal Aid Airport Program of the CAA by authorizing state financial assistance for developing state-owned and municipal-owned airports. Of the states participating in the Federal Aid Airport Program, at least 33 are offering technical aid to airport construction and development.

The model Airport Zoning Act has also been extensively used by state legislatures. This act empowers municipalities and other political subdivisions of a state to issue under the state police power regulations limiting height of structures and other potential navigational hazards and use of property in the vicinity of public airports. Further powers are given under the act to acquire by purchase air rights and other interests in land for the purpose of preventing obstruction of approaches to an airport.[4]

State Aviation Fuel Taxes

State taxes on motor fuels have been justified as benefit taxes on the theory that the operators of motor vehicles pay the cost of highways by means of a tax on gasoline consumed. By 1929 all of the 48 states were levying a tax at various rates on motor fuel. A majority of the states, however, either exempt from taxation gasoline used by aircraft or refund all or a part of such taxes. The accompanying tabulation indicates the extent to which various states have provided some form of gasoline tax exemption or refund to aircraft operators. Retail sales taxes applicable to gasoline as well as other commodities have not been included in the tabulation.

During the 1947-1948 state legislative sessions, there was a trend toward affording greater gasoline tax relief to operators of aircraft through either increasing the amount of refunds or providing complete exemptions. For example, the states of Ohio, Oklahoma, and Rhode Island joined the list of states providing full relief for fuel taxes, while Nebraska and South Dakota, which heretofore provided no relief, established a system of partial refunds. However, New Hampshire imposed a tax on fuel consumed in aircraft for the first time and Vermont increased its tax by a small amount.

CONCLUSION

An effort has been made to make an accurate presentation of the provisions of the state statutes relating to civil aviation. Because of the limitations attendant upon the presentation of state statutes in tabulation form and because of possible changes made in state laws subsequent to preparation, the charts should be used as a general guide only. They will serve as quick references and may indicate trends of state legislation in the overall program of federal-state cooperation. For specific information concerning the provisions of state laws, reference should of course be made directly to the state statutes.

---

[4] Suggested State Legislation Program for 1947, p. 61.

CIVIL AVIATION LEGISLATION ENACTED BY THE SECOND SESSION, 80th CONGRESS

P. L. 274 *Immigration*—To amend the Immigration Act with respect to the arrival of aliens or U.S. citizens at any port of entry by water or air. Approved July 30, 1947.

P. L. 486 *Federal Airport Act*—To extend provisions to Virgin Islands. Approved April 17, 1948.

P. L. 514 *Reciprocal Tax Exemption*—To make it possible for U.S. flag carriers operating in foreign countries to obtain an exemption from income taxes in countries which grant such exemptions on a reciprocal basis. Approved May 4, 1948.

P. L. 540 *Personal Exemption under Customs Laws*—To increase to $400 the personal exemption granted under the customs law for bringing into the U.S. articles acquired abroad. Approved May 19, 1948.

P. L. 548 *Reconstruction Finance Corporation*—To amend the RFC Act to extend the authority. Approved May 25, 1948.

P. L. 549 *Nat'l Advisory Committee for Aeronautics*—To promote the National Defense by increasing the membership of the NACA. Approved May 25, 1948.

P. L. 562 *Alaska Airports*—To authorize construction of airports at Anchorage and Fairbanks, Alaska. Appropriations for the construction of the airports ($13,000,000) were authorized in the Second Deficiency Appropriations bill, 1948. Approved May 28, 1948.

P. L. 647 *International Aviation Facilities*—To permit the CAA and Weather Bureau to establish, acquire, and operate air navigation facilities, airports, and meteorological facilities in foreign territory; to train foreign nationals in the operation of civil aircraft; to transfer airport and airway property in foreign territory and owned by the United States to a foreign government or an international organization; and to provide air navigation aids for civil air navigation throughout the Canal Zone and the Republic of Panama. Approved June 16, 1948.

P. L. 656 *Liability*—To encourage the financing of aircraft purchases by removing the risk of liability imposed by certain state laws on lenders not in possession of aircraft. (The purpose of this Act was to protect mortgagors and other security owners of aircraft from liability in damage suits arising out of aircraft accidents.) Approved July 2, 1948.

P. L. 657 *Thunderstorms*—To provide for an investigation of the causes and characteristics of thunderstorms. Approved June 16, 1948.

P. L. 692 *Recordation of Spare Parts*—To provide a system for the federal recordation of liens on engines and spare parts used by airlines. Approved June 19, 1948.

P. L. 738 *Weather Stations*—To authorize the Coast Guard to operate and maintain ocean weather stations, together with such air navigation facilities as CAA deems necessary. Approved June 22, 1948.

P. L. 786 *Loran Stations*—To authorize the Coast Guard to operate Loran stations to serve the needs of U.S. air commerce as deter-

mined by CAA. Approved June 26, 1948.

P. L. 815 *Traffic Control Tower Operators*—To provide for the training of. Approved June 29, 1948.

P. L. 819 *Air Parcel Post*—To establish an Air Parcel Post system. Approved June 29, 1948.

P. L. 840 *Federal Airport Act*—To amend Section 17 relating to reimbursement for damage by Federal agencies to public airports. Approved June 29, 1948.

P. L. 862 *Veteran Flight Training*—Independent Offices Supplemental Appropriations Act, 1949, provided, among other things, that teaching a veteran to fly and related aviation courses shall not be considered avocational or recreational, and therefore prohibited after July 1, 1948, when the veteran certifies that he has selected aviation education or training for use in connection with his existing or contemplated business, occupation, or education. Approved June 30, 1948.

P. L. 872 *CAA Powers Broadened*—(a) Permits CAA to acquire, establish, operate and maintain air navigation facilities wherever necessary, provided CAA shall give consideration to the requirements of National Defense; (b) authorizes CAA to acquire and dispose of real and personal property by purchase, condemnation, or lease, "including, in the case of air-navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith"; (c) authorizes CAA to take evidence, issue subpoenas, take depositions, and compile testimony as is vested in CAB by Section 1004 of the C. A. Act; and (d) authorizes CAB to delegate to CAA authority to prescribe safety regulations under Title VI of the Act, and to perform functions relating to accident investigation authorized under Section 702 of the Act, provided Board may prescribe procedures for review of actions taken by CAA under authority delegated hereunder as deemed necessary in the public interest. Approved July 1, 1948.

Of the twenty-three Bills introduced to carry out the recommendations of the Congressional Aviation Policy Board [1] five were passed and approved [2] by the President. The remaining Bills introduced to implement the recommendations of the Board died with the adjournment of Congress. It is significant to note that the measures that became law are minor in importance as compared with Bills that failed to pass, among them were: S. J. Res. 205, establishing a Joint Congressional Committee on Aviation Policy; S. 2448, providing for government reorganization (Omnibus Bill); S. 2449, concerning regulation of contract carriers; S. 2447 (5-year plan), "To provide for the planning of military aircraft requirements, to authorize the development and procurement of military aeronautical equipment . . ."; S. 2453, providing for the avoidance of multiple taxation of air commerce; S. 2450, concerning "settlement of claims arising from termination of contracts of the armed services . . ."; S. 2644, the Prototype Development Bill; S. 2458, regarding "carriage of all long range domestic and foreign first-class mail by air . . ." S. 2464, authorizing U.S. Maritime Commission to study the development of lighter-than-air rigid airships for commercial use, was passed by the Senate and House and was pocket vetoed by the President.

[1] 15 J. Air L. & C. (1948).
[2] Public Laws 647, 692, 656, 657, and 819.

INTERNATIONAL

Department Editor: Richard K. Waldo*

SECOND ASSEMBLY OF ICAO—SUMMARY REPORT OF THE UNITED STATES DELEGATION

THE SECOND ASSEMBLY of ICAO which met in Geneva, Switzerland from June 1 to June 21, 1948 reached substantial unanimity of agreement on all the major issues which confronted it. Under the aegis of the ACC the agencies of the U.S. Government primarily concerned with various phases of international civil aviation, the Office of the U.S. Representative to ICAO, ATA, AIA, and other governmental and private groups agreed upon draft instructions to the U.S. Delegation which were found to be in every way an adequate basis for the work assigned to the Delegation.

While the sessions of the Assembly were often protracted and the debate occasionally quite spirited, a willingness to recede from rigid national positions and a general air of cordiality prevailed which were in themselves as significant as any of the decisions taken by the Assembly. The U.S. Delegation, without compromising any vital objectives, was able to contribute materially to this spirit of genuine negotiation.

Convention on International Recognition of Rights in Aircraft

At the outset of the Assembly the Chairman of the U.S. Delegation stressed the particular importance of arriving at final agreement on a Convention on International Recognition of Rights in Aircraft. This remained a principal objective of the Delegation in the ensuing weeks.

Brussels Draft

The work upon the draft Convention was predicated upon the draft text prepared by the Legal Committee of ICAO at its meeting in Brussels in September, 1947, and subsequently circulated by ICAO to all member States for study and comment.[1] After extensive discussion, often involving vigorous differences in view among the participating nations, a revised text was agreed upon along the general lines embodied in the Brussels draft, but with some modifications in substance and considerable revision in language to improve its clarity. Final agreement on a text involved major adjustments and concessions as among the several systems of law prevailing among the member States, a process which was further complicated by language differences.

Principal Effects of Convention

The underlying concept of the Convention is provision for recognition by each of the contracting States with respect to the aircraft of other contracting States of rights and interests in such aircraft created under the law of the State of the aircraft's nationality. Thus, as to United States aircraft, security interests created and recorded in the United States will be recognized and given effect in accordance with the law of the United States when the aircraft is within the jurisdiction of any other contracting State, subject to certain qualifications relating to salvage claims and claims of involuntary creditors.

While the final agreed text does not embody fully the views of the United States, it is believed that it represents the maximum protection internationally of rights in aircraft upon which general agreement among the nations could be reached for some time. Such general agreement is essential since without widespread adherence no Convention will be effective. The U.S.

* Program Planning Officer, Staff Programs Office, Civil Aeronautics Administration.

[1] See, 14 J. Air L. & C. 500 (1947).

Delegation was successful in obtaining agreement to recognize its complicated security interests such as fleet mortgages and equipment trusts, which are largely unfamiliar to other nations, many of which do not even have national legislation providing for mortgages on aircraft. The Delegation also obtained provisions covering the recognition of security interests in spare parts located in foreign countries which should materially aid in financing the cost thereof.

The Convention as finally agreed upon will materially aid in the financing of aircraft registered in the United States to be used in international air navigation and will assist to a more limited degree in the financing of aircraft for export. It is believed that it represents a valuable step forward and that its formulation and adoption by the Assembly was a noteworthy accomplishment.

Signatures

The Assembly approved the text as open for signature on June 18, 1948 and as of July 1, 1948 the Convention was signed on behalf of their Governments by the representatives of 19 States:

Argentina	Chile	France	Portugal
Belgium	Dominican Republic	Iceland	United Kingdom
Brazil	Greece	Italy	United States
China	Mexico	Netherlands	Venezuela
Colombia	Switzerland	Peru	

Economic Matters

In the economic field the Second Assembly made significant progress toward fuller implementation of Article 5 of the Chicago Convention and hence toward greater freedom of movement for aircraft not engaged in scheduled air transportation. It has been recognized for some time that an essential prerequisite to effective action in this direction is general agreement on a definition of what constitutes "scheduled" air transportation, which under Article 6 of the Chicago Convention can operate internationally only with the "special permission of the other government concerned." The Assembly succeeded in developing a tentative definition of scheduled air services to be used as a basis for the comments of Contracting States.[2] The Council will adopt after consideration of the comments received, a definition, subject to periodic review, for the guidance of Contracting States.

At the same time, the Assembly recommended that Contracting States immediately extend freedom of admission into their territories to certain categories of aircraft registered in other States, without the necessity of applying for prior permission and with a minimum of advance notice. In brief, the categories included are aircraft engaged in: (a) private flights for pleasure; (b) flights on the business of the individual or enterprise owning the aircraft; and (c) all other non-scheduled flights not involving the doing of business in the territory entered.

The Assembly also gave its approval to the continuation of the economic studies now being conducted by the Organization in the fields of interna-

[2] Definition framed by the Economic Commission (Final Report, Doc. A2-EC/58, Appendix G):—

"For the purposes of the Convention, a 'scheduled international air service' is an international air service consisting of a recognizably systematic series of flights

(a) which are operated between two or more points or two or more traffic areas that, considering relevant characteristics of the service such as the distance covered and the type of aircraft used, do not materially vary;
(b) which are operated for valuable consideration; and
(c) which are open to use by members of the public [acceptable to the carrier] who from time to time seek to take advantage of them."

Note:—The expression in brackets has caused particular difficulty in the preparation of the description.

tional air mail, costs of air navigation facilities and services, joint ownership and operation of international air lines, and problems arising from duplicate insurance requirements affecting international air carriers.

Joint Support

During the past two years ICAO Regional Meetings have outlined successive segments of the pattern of air navigation facilities which will be required to make possible safe, regular, and efficient international air transportation to all parts of the world. Recognizing that much of the basic preparatory work has been done or will be completed in the near future by the Regional Meetings, the Second Assembly has requested the Council to undertake a review of the world situation and to determine in particular to what extent Contracting States will be able to meet the indispensable requirements for international civil aviation facilities in their respective territories as contemplated in Article 28 of the Chicago Convention. This review should develop in broad outline the gap between the facilities found to be essential and those which can in fact be provided by the Contracting States. The knowledge thus gained will give the Organization a key to the magnitude of the problem facing it in its attempt to secure the establishment of air routes throughout the world, and it will assist Contracting States in determining the degree of priority to be assigned to each particular project which is presented for Joint Support assistance.

Technical Field

A careful review by the Assembly of the progress made by the Organization in the technical field brought to the fore two opposing theories regarding the proper division of function between the representative divisions and committees of ICAO on one hand and the international secretariat on the other. The U.S. Delegation was successful in securing wide agreement on the principle that the basic technical work of the Organization should be performed in meetings of representatives of the Contracting States with the advice and assistance of the professional experts of the Secretariat. The Assembly decision to continue the practice of holding technical Divisional meetings at the headquarters in Montreal rather than at scattered locations gives assurance of continued close liaison and teamwork between the representatives of the Contracting States and the staff of the Organization.

Other significant advances made by the Assembly in the technical sphere include acceptance of the view that enforcement action for violations of regulations by airmen and aircraft of another country should be the primary responsibility of the State in which the violation occurs rather than the country of certification of the airman or aircraft. Measures were also taken to facilitate recognition of certificates and licenses issued by Contracting States, pending the coming into force of appropriate standards, such recognition to be extended only for the purpose of flight into or across the territory of another Contracting State. The Assembly also accepted a proposal which will greatly relieve governments, airmen, and aircraft operators of heavy burdens imposed by Article 39 of the Convention with respect to the endorsement of certificates and licenses for international operation.

Air Navigation Commission-Committee Problem

One of the most difficult internal organizational problems which confronted the Assembly was the necessity of implementing Articles 54(e) and Article 56 of the Chicago Convention, which require the establishment of an Air Navigation Commission, without sacrificing the valuable experience and organizational relationships which have developed under the pre-existing Air Navigation Committee system. A serious split on this issue was averted by a compromise arrangement proposed by the United States which gained unanimous support. Under this plan the Organization will now comply tech-

nically with the mandate of its charter with procedural safeguards to be worked out in detail by the Council which will retain the cardinal points of United States policy, including particularly unqualified responsibility and authority in the Council over the work of the Air Navigation Committee.

Administrative Matters

Following a recommendation of the Council, the Assembly adopted a fiscal year to correspond with the calendar year in accordance with the practice of the United Nations and the other specialized agencies. This necessitated adopting a budget for an 18 month period. The Assembly adopted a budget for the period July 1 to December 31, 1948 of $1,339,882, and for the period January 1 to December 31, 1949 of $2,649,685. This is essentially the same budget as last year, and follows the recommendations of the Council with the sole exception of a reduction in the Working Capital Fund of $25,000. In connection with the budget discussions, Argentina with the support of the United States was successful in securing the adoption of a resolution requesting the Council to consider the possibility of further extending the public information services of ICAO within the limits of the present budget. It is hoped that Council action in this regard will result in wider public understanding of the work of the Organization and of the basic objectives to which it has been dedicated since the Chicago Conference of 1944.

The United States unit share in the budget of the Organization remains unchanged; in terms of dollars, the United States obligation is slightly less than last year as a result of increased membership in ICAO. The relatively small proportion of the expenses of ICAO borne by the United States compared with United States contributions to other similar international organizations reflects not only a realistic acceptance by other States of their own obligations, but is also, in large measure, a recognition of the valuable non-financial contributions which the United States continues to make in terms of technical information and assistance to the Organization.

A proposal to abolish the system of deductions from the salaries of Staff Members of ICAO in lieu of income taxes was strongly supported by many States favoring the principle of freedom from taxation for international civil servants. Owing to strenuous efforts by the United States Delegation, this action was, in effect, postponed pending a decision by the next session of the Assembly of the United Nations with respect to the problem of Staff deductions.

Policy on Amendments

The Assembly adopted a policy that no amendments to the Chicago Convention will be considered until the next full Assembly in 1950 unless such amendments are urgently required. In line with this policy, the Assembly rejected an effort to secure the deletion of Article 41, relating to the recognition of existing standards of airworthiness. The U.S. Delegation joined with other countries in an acceptable compromise calling for a full study of this problem by the Council, emphasizing strongly that any final action taken on Article 41 must take into account the safety and economic welfare of the public and the security of the heavy investments of aircraft manufacturers and air transport operators in equipment now in operation or in production.

New Members

The applications of Austria and Finland for admission to membership in ICAO were approved by the Assembly without a dissenting vote. In moving adoption of the resolution favoring the admission of the Republic of Finland, the Chairman of the U.S. Delegation emphasized that the growing effectiveness of ICAO depends in part upon the inclusion of all States of the

world which in spirit and action have demonstrated their interest in the orderly development of international air transport as an instrument of peaceful commerce, and he paid tribute to the sincerity with which Finland has accepted and discharged its international obligations. In the absence of objection by the General Assembly of the United Nations at its next session, Austria and Finland will be accorded full membership status in the Organization.

Conclusion

It will be apparent from the above review that the Government of the United States and its component public and private agencies demonstrated its willingness to recognize sincere differences and the legitimate interests of other Contracting States, and to work cooperatively for the interests of all without coercion and with a maximum of good will and understanding. This attitude, practically without exception, prevailed throughout the Delegations of other countries and was instrumental in ensuring a successful assembly.

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

Financial Matters

A "marriage" between the IATA Clearing House at London and the Airlines Clearing House maintained at Chicago by North American carriers was consummated during May. Because IATA Clearing House accounts can be settled in either dollars or pounds sterling, North American domestic companies will be able now to accept bookings from soft currency areas as well as from those countries which pay in dollars. Clearance between two airlines belonging to different Clearing Houses will be made between the London and Chicago establishments themselves, with final settlement between the airline and its own clearing house. The arrangement will also cut down accounting complications and eliminate brokerage payments and the risk of currency fluctuation.

International air traffic transactions handled by the IATA Clearing House during the first four months of 1948 total $24,938,000, more than four times the total for the same period of 1947. In the meanwhile, membership of the Clearing House has increased from 19 to 27. April clearances established a new high mark for the year at $7,140,000. This total turnover was finally settled, after offsetting of credit and debit balances, by cash payments of only $770,000 or 11%.

The IATA Financial Committee met at Estoril, Portugal, during May to discuss its continuing activities. Further progress was reported in studies of standardization of airline accountancy systems, and preliminary work was made on certain aspects of passenger insurance.

Legal Matters

The fourth meeting of the Legal Committee held at Montreal in April considered two main questions:

(a) The program of the ICAO Legal Committee, which includes the Warsaw Convention, the Rome Convention, the Brussels Protocol,

Legal Status of the Aircraft Commander and Definitions, and the Rights in Rem (Mortgage) Convention.

(b) The Draft General Conditions of Carriage as prepared by an *ad hoc* committee.

The Warsaw Convention Special Committee has been at work for six months, and IATA's Observer to the Geneva meeting of the ICAO Legal Committee has prepared briefs on IATA's position covering all the above matters.

IATA's policy on the Warsaw Convention is that any revision at the present time would be premature, inadvisable and wholly confusing. This point of view was adopted at Cairo in 1946, and was re-affirmed in 1948 for the following reasons:

(a) The general postwar political and economic situation is not yet clarified;
(b) Important parts of the world are still occupied by military forces;
(c) Currencies of many important nations are not yet stabilized;
(d) Free movement of world commerce under normal peacetime conditions is not yet fully restored;
(e) The continually changing draft recommendations to proposed amendments confirm the lack of general agreement.

In the opinion of the Special Committee, instead of pressing for a revision of the Warsaw Convention, or substituting a new Convention in its place, every effort should be made by ICAO and by Members of IATA to widen the international acceptance of the Warsaw Convention. The Committee believes that this Convention has worked reasonably well under the varying world conditions which have prevailed during the years since it came into force.

Possible revisions of the Rome Convention and the Brussels Protocol were also considered, and it has been recommended that they should not be dealt with separately, but only in conjunction with the revision of the Warsaw Convention. The view was expressed that a General Aviation Liability Code would be the best solution for the various problems involved in the different Conventions relating to the liability of the carrier.

The Committee considered the draft Convention on International Recognition of Rights in Aircraft and the comments received thereon from the various governments, and recommended that Article 3 of the draft Convention should be re-drafted, as it appeared to create rights, whereas it was intended only to fix priorities. The recommendation was accepted by Second ICAO Assembly.

Regarding other items on the program of the ICAO Legal Committee, the IATA Legal Committee has expressed the view that there was still no urgent need for a convention on the Legal Status of the Aircraft Commander.

The Legal Committee has taken the view that close liaison should continue to be maintained between the ICAO Legal Committee and the IATA Legal Committee, in order that the consolidating and crystallizing views of the international carriers may be given full consideration. The Committee is authorized to make direct recommendations to the ICAO Legal Committee after discussion in each case with the Director General.

The Chairman of the Legal Committee was authorized to appoint *ad hoc* working committees and rapporteurs (if the occasion for their use arose), in lieu of the present sub-committees of the Legal Committee which were dissolved. The following *ad hoc* working committees may be established:

(a) Committee on Definitions (Glossary of Traffic Terms);
(b) Committee to study and recommend rules of liability which might be incorporated in a general code of aviation liability;
(c) Committee to consider legal questions which might arise out of any subsequent revision of the uniform passenger ticket and baggage check and the conditions of carriage; also to consider the desirability of creating a negotiable air waybill/consignment note.

As a result of the discussions on the Rules of Liability in respect to the Conditions of Carriage for Goods, a rapporteur was designated by the Chairman to study and report on the question of the feasibility of settling, by arbitration, disputes arising out of the use of the air waybill/consignment note.

A particular problem in connection with the legal drafting of Traffic Conference resolutions has been the date of their effectiveness. Conference resolutions are not valid without the approval of interested governments. At the Rio Conferences, it was arranged that the vast majority of resolutions should become effective as of a definite date and approximately 379 of them have so come into force. Under this arrangement, resolutions may be considered effective even though one or more carriers have notified the Conference Secretary, in accordance with the Provisions for Conference regulation, that they cannot be bound by particular resolutions because of lack of governmental approval. Had it been provided that each resolution should be effective only after all governments concerned had approved, only one out of almost 400 would have been completely in force seven months after their adoption by the Conference. Various approaches to this problem have been used since Rio and there is now under consideration a project for making Conference resolutions effective that would afford governments 45 days in which to act or to indicate a desire for a definitely limited time extension.

Technical Matters

The second Annual IATA Technical Conference, held at Ste. Agathe, P. Q., Canada, June 8-22, resulted in a wide variety of measures aimed at increasing the reliability and cutting the cost of international air transport. The meetings were attended by 150 technical heads of 23 airlines, from 17 countries. Summarized briefly, the four working groups of the Conference achieved, among other things:

Recommendations for the pooling of certain ground equipment and supplies.
Impetus for more widespread installation of airport approach lighting.
Better measures for the speedy handling of planes at international airports.
Greater coordination of communications and navigation facilities.
More widespread use of pressure pattern flying on long routes.
Worldwide agreement among airlines on conformity of approach and let-down procedures.

The Conference also provided an opportunity for engineers from all continents to exchange data and experience in flying problems. International symposiums on maintenance of specific transport aircraft and other matters, conducted at the Conference for the first time this year, proved to be particularly valuable and will be repeated at the 1949 Technical Conference in Europe.

Traffic Matters

Recognizing that the business of the IATA Traffic Conference is now settling down to an even routine, the Executive Committee at its semi-annual

meetings in Montreal during April changed the provisions for Conference regulation in order to make their two meetings a year optional, rather than mandatory. If the amendment is approved by interested governments, a considerable saving of time and expense is expected to result. Meanwhile, a meeting of IATA Traffic Conference No. 2, called in June to deal with rate problems arising out of currency fluctuations, drafted recommendations for a schedule of Winter fares in which these problems are largely overcome. Region No. 2 also met with representatives of the other two conferences to review rates on inter-Conference routes.

A feature of the new European rate schedule is the establishment of low 15-day excursion fares between some points. The inter-Conference rate structure also provides for 50 per cent reductions in fares over certain long routes for children being schooled away from home.

Preparation of the first universal rules tariff for international airlines was commissioned by the Executive Committee and is scheduled to be completed by the Head Office by the end of the year. This document, plus a joint tariff of North Atlantic fares also authorized by the Committee, may be the first in a series designed to cover the worldwide operations of IATA member companies. The project will be self-supporting.

Introduction of the use by IATA member companies of the Universal Interline Reservations Code, with minor changes to suit the needs of international operators, was also approved by the Executive Committee. The changes will be made in close cooperation with the Air Transport Association of the United States, where the code is already in use.

Relations with ICAO

IATA was represented at the Second ICAO Assembly at Geneva in June by the Director General, Sir William P. Hildred, and the Legal Adviser, John C. Cooper, as chief observers. Preceding the Assembly IATA representatives also attended meetings in Geneva of the ICAO Legal Committee and the ICAO Facilitation Division. IATA technical delegations took part in ICAO Regional Air Navigation Meetings covering the North Atlantic and Europe-Mediterranean areas during May at Paris.

Medical Panel

A new IATA Medical Panel was created by the April meeting of the Executive Committee to deal with all aspects of international airline operations. Composed of leading aeromedical authorities, the Panel held its inaugural meeting at Toronto, Canada, on June 17, during the concurrent annual meeting of the Aero Medical Association. They discussed a study of flight time limitations and medical requirements for aircrew personnel.

JOINT SUPPORT OF AIR NAVIGATION FACILITIES LOCATED IN ICELAND—RESULTS OF THE ICAO CONFERENCE

The Final Act of the Icelandic Conference, held in Geneva under ICAO auspices to conclude an arrangement for the joint support of air navigation facilities located in Iceland, was signed June 26, 1948. States which participated in the Conference included:

Belgium	Iceland	United Kingdom
Canada	Netherlands	United States
Denmark	Norway	
France	Sweden	

All of the interested states signed the Final Act except the Netherlands and Norway, both of which expect to sign in the near future.

The Final Act of the Conference makes specific recommendations to each of the interested states, to Iceland and to the ICAO Council concerning the principles and procedures to be followed in financing on an international basis the costs of air traffic control, communications, and meteorological services located in Iceland. These services have been found essential for safe, efficient and regular international air transportation over the important North Atlantic routes.

The Icelandic Conference recommended that payments to be made to Iceland through ICAO be divided into two parts:

1. A lump sum of 7.5 million kronur [1] for the period ending December 31, 1948. Added to this sum was a cushion of 200 thousand kronur to defray ICAO extraordinary expenses and provide for any contingencies;

2. Payments not to exceed 3.5 million kronur annually beginning in calendar 1949. The maximum annual cost of the services was estimated at 4,225,000 kronur. Iceland agreed to contribute annually 17.5% of the costs, or about 750,000 kronur. The contributing states agreed to recommend maximum assessments not to exceed 10% of the total future annual cost estimate. Thus the ICAO Council will have annually a cushion of 10% of the total funds to be assessed contributing states for (a) reimbursement to ICAO for extraordinary expenses, (b) slight cost increases over the annual cost estimates, or (c) deficiencies in payment of assessments on the part of any contributing state.

The assessments apportioned among states whose flag carriers use the Icelandic air navigation facilities were based on the principle of aeronautical benefits each state expects to derive from the services. In other words, the assessments to each user state were apportioned according to past flight schedules over the North Atlantic from July 1, 1946 through May 31, 1948 for the retroactive lump sum payment; thereafter, the annual assessments will be based on statistics of scheduled flights for the preceding fiscal year, excluding those through the Azores and Bermuda, across the North Atlantic.

Based on this formula, the contributing states agreed, for the retroactive payment extending through December 31, 1948, to recommend assessment as follows:

	Percentage	*Amount Payable to Iceland Icelandic Kronur*	*Amount of Assessment Icelandic Kronur*
Belgium	1.2	90,000	92,400
Canada	9.3	697,500	716,100
Denmark	1.85	139,300	143,000
France	4.6	345,000	354,200
Netherlands	5.6	420,000	431,200
Norway	1.85	139,300	143,000
Sweden	2.8	208,900	214,500
United Kingdom	11.1	832,500	854,700
United States	61.7	4,627,500	4,750,900
Total	100.0%	7,500,000	7,700,000

[1] Official rate of exchange is 6.4885 kronur for $1.

For the calendar year 1949 and thereafter Iceland agreed to accept 17.5% of the estimated cost of the services. The recommended assessment for 1949 and maximum assessments thereafter are as follows:

	Percentage	*Amount Payable to Iceland for 1949 Icelandic Kronur*	*Maximum Assessment Icelandic Kronur*
Belgium	1.8	71,599	83,655
Canada	7.1	282,419	329,973
Denmark	1.7	67,622	79,672
France	4.1	163,087	190,547
Netherlands	4.9	194,909	227,728
Norway	1.7	67,622	79,672
Sweden	2.6	103,431	119,508
United Kingdom	9.9	393,796	460,102
United States	48.7	1,937,161	2,263,333
Total	82.5%	3,281,636	3,834,190

Upon signature of the Final Act, the ICAO Council on the same date unanimously accepted the recommendations contained in the Final Act of the Icelandic Conference and took action to assess the contributing states in accordance with Article 73 of the Chicago Aviation Convention. Although the bilateral agreement between the Government of Iceland and the ICAO Council as envisaged by Chapter XV of the Chicago Convention was not finally consummated, owing to Council adjournment, a final draft is under study by individual Council members. The Council will undoubtedly consider the agreement at its first meeting of the Fall Council session.

EDWARD S. PRENTICE*

CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT, SIGNED AT GENEVA, JUNE 19, 1948†

WHEREAS the International Civil Aviation Conference, held at Chicago in November-December 1944, recommended the early adoption of a Convention dealing with transfer of title to aircraft,

WHEREAS it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognized internationally,

THE UNDERSIGNED, duly authorized, HAVE AGREED, on behalf of their respective Governments, AS FOLLOWS:

Article I

(1) The Contracting States undertake to recognize:
  (a) rights of property in aircraft;
  (b) rights to acquire aircraft by purchase coupled with possession of the aircraft;
  (c) rights to possession of aircraft under leases of six months or more;
  (d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

  (i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and

* Assistant Chief, Aviation Division, Department of State, and member of U.S. Delegation to Conference. This report is submitted by Mr. Prentice in his personal capacity.

† A2-P/27, 17/6/48 Revised, Doc. 5667.

(ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.

The regularity of successive recordings in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to nationality at the time of each recording.

(2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not admit or recognize any right as taking priority over the rights mentioned in paragraph (1) of this Article.

Article II

(1) All recordings relating to a given aircraft must appear in the same record.

(2) Except as otherwise provided in this Convention, the effects of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

(3) A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law.

Article III

(1) The address of the authority responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts of the particulars recorded. Such copies or extracts shall constitute *prima facie* evidence of the contents of the record.

(3) If the law of a Contracting State provides that the filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.

(4) Reasonable charges may be made for services performed by the authority maintaining the record.

Article IV

(1) In the event that any claims in respect of:

(a) compensation due for salvage of the aircraft, or

(b) extraordinary expenses indispensable for the preservation of the aircraft

give rise, under the law of the Contracting State where the operations of salvage or preservation were terminated, to a right conferring a charge against the aircraft, such right shall be recognized by Contracting States and shall take priority over all other rights in the aircraft.

(2) The rights enumerated in paragraph (1) shall be satisfied in the inverse order of the dates of the incidents in connection with which they have arisen.

(3) Any of the said rights may, within three months from the date of the termination of the salvage or preservation operations, be noted on the record.

(4) The said rights shall not be recognized in other Contracting States after expiration of the three months mentioned in paragraph (3) unless, within this period,

(a) the right has been noted on the record in conformity with paragraph (3), and

(b) the amount has been agreed upon or judicial action on the right has been commenced. As far as judicial action is concerned, the law of the forum shall determine the contingencies upon which the three months period may be interrupted or suspended.

(5) This Article shall apply notwithstanding the provisions of Article I, paragraph (2).

Article V

The priority of a right mentioned in Article I, paragraph (1) (d), extends to all sums thereby secured. However, the amount of interest included shall not exceed that accrued during the three years prior to the execution proceedings together with that accrued during the execution proceedings.

Article VI

In case of attachment or sale of an aircraft in execution, or of any right therein, the Contracting States shall not be obliged to recognize, as against the attaching or executing creditor or against the purchaser, any right mentioned in Article I, paragraph (1), or the transfer of any such right, if constituted or effected with knowledge of the sale of execution proceedings by the person against whom the proceedings are directed.

Article VII

(1) The proceedings of a sale of an aircraft in execution shall be determined by the law of the Contracting State where the sale takes place.
(2) The following provisions shall however be observed:

(a) The date and place of the sale shall be fixed at least six weeks in advance.

(b) The executing creditor shall supply to the Court or other competent authority a certified extract of the recordings concerning the aircraft. He shall give public notice of the sale at the place where the aircraft is registered as to nationality, in accordance with the law there applicable, at least one month before the day fixed, and shall concurrently notify by registered letter, if possible by air mail, the recorded owner and the holders of recorded rights in the aircraft and of rights noted on the record under Article IV, paragraph (3), according to their addresses as shown on the record.

(3) The consequences of failure to observe the requirements of paragraph (2) shall be as provided by the law of the Contracting State where the sale takes place. However, any sale taking place in contravention of the requirements of that paragraph may be annulled upon demand made within six months from the date of the sale by any person suffering damage as the result of such contravention.

(4) No sale in execution can be effected unless all rights having priority over the claim of the executing creditor in accordance with this Convention which are established before the competent authority, are covered by the proceeds of sale or assumed by the purchaser.

(5) When injury or damage is caused to persons or property on the surface of the Contracting State where the execution sale takes place, by any aircraft subject to any right referred to in Article I held as security for an indebtedness, unless adequate and effective insurance by a State or an insurance undertaking in any State has been provided by or on behalf of the operator to cover such injury or damage, the national law of such Contracting State may provide in case of the seizure of such aircraft or

any other aircraft owned by the same person and encumbered with any similar right held by the same creditor:

(a) that the provisions of paragraph (4) above shall have no effect with regard to the person suffering such injury or damage or his representative if he is an executing creditor;

(b) that any right referred to in Article I held as security for an indebtedness encumbering the aircraft may not be set up against any person suffering such injury or damage or his representative in excess of an amount equal to 80% of the sale price.

In the absence of other limit established by the law of the Contracting State where the execution sale takes place, the insurance shall be considered adequate within the meaning of the present paragraph if the amount of the insurance corresponds to the value when new of the aircraft seized in execution.

(6) Costs legally chargeable under the law of the Contracting State where the sale takes place, which are incurred in the common interest of creditors in the course of execution proceedings leading to sale, shall be paid out of the proceeds of sale before any claims, including those given preference by Article IV.

Article VIII

Sale of an aircraft in execution in conformity with the provisions of Article VII shall effect the transfer of the property in such aircraft free from all rights which are not assumed by the purchaser.

Article IX

Except in the case of a sale in execution in conformity with the provisions of Article VII, no transfer of an aircraft from the nationality register or the record of a Contracting State to that of another Contracting State shall be made, unless all holders of recorded rights have been satisfied or consent to the transfer.

Article X

(1) If a recorded right in an aircraft of the nature specified in Article 1, and held as security for the payment of an indebtedness, extends, in conformity with the law of the Contracting State where the aircraft is registered, to spare parts stored in a specified place or places, such right shall be recognized by all Contracting States, as long as the spare parts remain in the place or places specified, provided that an appropriate public notice, specifying the description of the right, the name and address of the holder of this right and the record in which such right is recorded, is exhibited at the place where the spare parts are located, so as to give due notification to third parties that such spare parts are encumbered.

(2) A statement indicating the character and the approximate number of such spare parts shall be annexed to or included in the recorded document. Such parts may be replaced by similar parts without affecting the right of the creditor.

(3) The provisions of Article VII, paragraphs (1) and (4), and of Article VIII shall apply to a sale of spare parts in execution. However, where the executing creditor is an unsecured creditor, paragraph 4 of Article VII in its application to such a sale shall be construed so as to permit the sale to take place if a bid is received in an amount not less than two-thirds of the value of the spare parts as determined by experts appointed by the authority responsible for the sale. Further, in the distribution of the proceeds of sale, the competent authority may, in order to pro-

vide for the claim of the executing creditor, limit the amount payable to holders of prior rights to two-thirds of such proceeds of sale after payment of the costs referred to in Article VII, paragraph (6).

(4) For the purpose of this Article the term "spare parts" means parts of aircraft, engines, propellers, radio apparatus, instruments, appliances, furnishings, parts of any of the foregoing, and generally any other articles of whatever description maintained for installation in aircraft in substitution for parts or articles removed.

Article XI

(1) The provisions of this Convention shall in each Contracting State apply to all aircraft registered as to nationality in another Contracting State.

(2) Each Contracting State shall also apply to aircraft there registered as to nationality:

(a) The provisions of Articles II, III, IX and

(b) The provisions of Article IV, unless the salvage or preservation operations have been terminated within its own territory.

Article XII

Nothing in this Convention shall prejudice the right of any Contracting State to enforce against an aircraft its national laws relating to immigration, customs or air navigation.

Article XIII

This Convention shall not apply to aircraft used in military, customs or police services.

Article XIV

For the purpose of this Convention, the competent judicial and administrative authorities of the Contracting States may, subject to any contrary provision in their national law, correspond directly with each other.

Article XV

The Contracting States shall take such measures as are necessary for the fulfillment of the provisions of this Convention and shall forthwith inform the Secretary General of the ICAO of these measures.

Article XVI

For the purposes of this Convention the term "aircraft" shall include the airframe, engines, propellers, radio apparatus, and all other articles intended for use in the aircraft whether installed therein or temporarily separated therefrom.

Article XVII

If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible, references in this Convention to the law of the Contracting State shall be construed as references to the law of that territory.

Article XVIII

This Convention shall remain open for signature until it comes into force in accordance with the provisions of Article XX.

Article XIX

(1) This Convention shall be subject to ratification by the signatory States.

(2) The instruments of ratification shall be deposited in the archives of the ICAO, which shall give notice of the date of deposit to each of the signatory and adhering States.

Article XX

(1) As soon as two of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the second instrument of ratification. It shall come into force, for each State which deposits its instrument of ratification after that date, on the ninetieth day after the deposit of its instrument of ratification.

(2) The ICAO shall give notice to each signatory State of the date on which this Convention comes into force.

(3) As soon as this Convention comes into force, it shall be registered with the United Nations by the Secretary General of the ICAO.

Article XXI

(1) This Convention shall, after it has come into force, be open for adherence by non-signatory States.

(2) Adherence shall be effected by the deposit of an instrument of adherence in the archives of the ICAO, which shall give notice of the date of the deposit to each signatory and adhering State.

(3) Adherence shall take effect as from the ninetieth day after the date of the deposit of the instrument of adherence in the archives of the International Civil Aviation Organization.

Article XXII

(1) Any Contracting State may denounce this Convention by notification of denunciation to the ICAO, which shall give notice of the date of receipt of such notification to each signatory and adhering State.

(2) Denunciation shall take effect six months after the date of receipt by the ICAO of the notification of denunciation.

Article XXIII

(1) Any State may at the time of deposit of its instrument of ratification or adherence, declare that its acceptance of this Convention does not apply to any one or more of the territories for the foreign relations of which such State is responsible.

(2) The ICAO shall give notice of any such declaration to each signatory and adhering State.

(3) With the exception of territories in respect of which a declaration has been made in accordance with paragraph (1) of this Article, this Convention shall apply to all territories for the foreign relations of which a Contracting State is responsible.

(4) Any State may adhere to this Convention separately on behalf of all or any of the territories regarding which it has made a declaration in accordance with Paragraph (1) of this Article and the provisions of paragraphs (2) and (3) of Article XXI shall apply to such adherence.

(5) Any Contracting State may denounce this Convention, in accordance with the provisions of Article XXII, separately for all or any of the territories for the foreign relations of which such State is responsible.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Geneva, on the 19th day of the month of June of the year 1948 in the English, French and Spanish languages, each text being of equal authenticity.

This Convention shall be deposited in the archives of the ICAO where, in accordance with Article XVIII, it shall remain open for signature.

JUDICIAL AND REGULATORY DECISIONS

Department Editor: Amory O. Moore *

ALLOCATION OF AIR TRANSPORTATION COSTS IN DETERMINING DOMESTIC MAIL, PASSENGER, AND CARGO RATES**

INTRODUCTION

RECENTLY several major air carriers have petitioned the Civil Aeronautics Board for increases in their rates of compensation for carrying the mail.[1] These same air carriers have likewise, along with other carriers, filed tariffs with the Board reducing their rates for the transportation of air freight.[2] For example, it is requested that mail compensation be increased from 45 cents per mail ton-mile to $1.25 per mail ton-mile while the new tariffs for cargo shipments propose charges as low as 14 cents per cargo ton-mile. The mail rate can become effective only with the Board's approval, while the cargo rates can go into effect in 30 days, provided the Board does not disapprove. A question immediately arises: Should the Board, in complying with its statutory duties under the Civil Aeronautics Act of 1938 and in view of the policies and purposes set forth in the Act, give its approval to these new rates? It is with this question that this paper is concerned. In particular, the factors that the Board must consider in prescribing fair and reasonable rates for the carrying of mail, passengers, and cargo and the relationship that should exist as among the various rates, will be considered.

The Civil Aeronautics Act of 1938, as amended,[3] gives the Civil Aeronautics Board the power to regulate the rates of compensation the carriers are to receive, or charge, for the carrying of mail, passengers, and cargo. In the case of mail, the Board is empowered and directed by Section 406(a) to determine "the fair and reasonable rates of compensation for the transportation of mail by aircraft"; the method or methods of ascertaining these are left to the Board. Section 406(b) prescribes the factors that the Board shall consider in determining the rates. In the case of passengers and cargo, the carriers are to determine, in the first instance, the just and reasonable rates; Section 403 provides that tariffs shall be filed with the Board showing all rates. If the Board is of the opinion that these are not just, reason-

---

* Journal Editor, Northwestern University Legal Publications Board.

** This comment was placed in the hands of the printer prior to the Board's issuance of its "tentative findings and conclusions" in the "Big 5" Mail Rate Case Dockets 3309 *et al.*, Serial Nos. E-1351-55 (Mar. 29, 1948).

[1] United Air Lines, CAB Docket No. 3014, filed July 1, 1947. United petitioned for a "substantial increase" in its mail rate retroactive from Jan. 1, 1947, and by amendment No. 2 filed November 29, 1947, requested $2.26 per ton-mile for the year 1947 and $1.25 per ton-mile on and after Jan. 1, 1948; Eastern A. L., CAB Doc. 3021, filed July 8, 1947, requested 60¢ per ton-mile; National A. L., CAB Doc. 3037, filed July 14, 1947, amended Oct. 10, 1947, requested rate based on minimum poundage factor of 500 lbs. per revenue mile; Mid-Continent A. L., CAB Doc. 3048, filed July 25, 1947, requested 22¢ per airplane mile on stated base; Delta A. L., CAB Doc. 3119, filed Sept. 9, 1947, requested 60¢ per ton-mile based on load factor formula.

[2] American Airlines, tariffs filed Sept. 4; United Air Lines, tariffs filed Sept. 5. The proposed rates generally reduce present commodity rates of approximately 21 cents per ton-mile to 14 cents per ton-mile, 52 Am. Av. Daily 323. These reductions follow a 25 per cent rate reduction filed for the same and other scheduled carriers July 15, 1947. The CAB allowed the latter to go into effect Aug. 1, 52 Am. Av. Daily 152.

[3] 52 Stat. 977 (1938), 49 USCA §401 (Supp. 1946).

able, or equitable, it is empowered by Section 1002 to determine and prescribe such rates. The factors that the Board shall consider in exercising this power are likewise given. Thus, in the final analysis, the Board is authorized to control and regulate the rates of compensation that the air carriers are to receive, or charge, for the carrying of mail, passengers and cargo. While the authority to regulate the several types of rates are set out in separate sections of the Act, the Board must exercise each consistent with the policies of the Act set out in Section 2. The rate-making problem confronting the Board, therefore, is not one of prescribing individual rates for the several types of service rendered by the carriers according to standards set out in separate sections of the Act, but one of prescribing, or assenting to, individual rates only after the Board has determined that, jointly, these rates effectuate, as nearly as possible, the policies of the Act.

Air Mail Rates

The Civil Aeronautics Board was not the first governmental agency directed to prescribe rates of compensation paid to the air carriers for carrying the mail. First the Post Office Department, and later, the Interstate Commerce Commission were authorized to do so.[4]

The Post Office Department determined the rates of compensation from 1925 to 1934; these were not related to the individual carrier's cost of rendering the service but were based, at first on the amount of revenue derived from the mail, and later on the types of service rendered by each carrier. When Congress, by the Kelly Act of 1925,[5] authorized the transportation of the mail by private carriers, the Postmaster General was required to establish services by letting contracts for the several mail routes. The rates under these contracts were determined competitively, but the total payments were not to exceed 80 per cent of the postal revenue on each route. An amendment[6] to the Kelly Act in 1926 authorized rates of compensation up to $3.00 per pound for the first 1,000 miles of a route; payments were no longer directly dependent upon the amount of postal revenue. The Air Mail Act of 1928[7] authorized the Postmaster General to convert the contracts into route certificates and to determine rates by negotiation with the carriers, still subject to the $3.00 per pound maximum. The Air Mail Act of 1930[8] provided for a "space-distance" basis of compensation not to exceed $1.25 per airplane-mile, regardless of the amount of space contracted. The Post Office Department, in administering this Act, based the mail pay on a number of variable factors in an attempt to provide for equitable compensations and, at the same time, to encourage the extension of passenger service and the use of improved operating equipment.[9] The whole system of variables was abandoned in 1933 and payments were based on a straight per mile basis.

---

[4] For a detailed study of air mail rate-making by the Post Office Department from 1925 to 1934, by the Interstate Commerce Commission from 1934 to 1938, and by the Civil Aeronautics Board in its early years, see: Goodman, Government Policy Toward Commercial Aviation—Competition and the Regulation of Rates, 59 *et seq.* (King's Crown Press, N. Y., 1944); Spencer, Air Mail Payments and the Government (Brookings Inst., 1941); Puffer, Air Transportation (Blakiston Co., Phila., 1941) 256 *et seq.*

[5] 43 Stat. 805.

[6] 44 Stat. 692.

[7] 45 Stat. 594.

[8] 46 Stat. 259.

[9] The following entitled the carrier to a higher mail rate per airplane-mile: night flying, 15 cents; terrain, 2 cents; fog, 2.5 cents; radio, 3 to 6 cents; passenger equipment, 1.5 to 7.5 cents; and multimotor operation, 13 cents; all in addition to a base rate depending on the amount of space contracted. Post Office Department, 1931 Annual Report 126.

The Interstate Commerce Commission determined the rates of compensation from 1934 to 1938; these were related to the individual carrier's costs. The Air Mail Act of 1934[10] authorized the Postmaster General to establish mail services by letting one year contracts; the rates were determined by competitive bidding. At the end of the year the contracts were extended indefinitely and the rates under them were determined by the Interstate Commerce Commission. These were to be fair and reasonable, but were not to exceed 33⅓ cents per airplane mile for a minimum load of 300 pounds. By 1938, the total compensation to the carriers was not to exceed the mail revenue.

Section 6(a) of the Air Mail Act of 1934 directed the Commission to fix and determine by order

> "the fair and reasonable rates of compensation for the transportation of air mail by airplane and the service connected therewith over each air-mail route. . . ."

This was to be determined, according to Section 6(e), by considering

> "the amount of air mail so carried, the facilities supplied by the carriers, and its revenue and profits from all sources. . . ."

The rates were to be established separately for each route; these were related to the costs of the individual carriers.

Each carrier generally operated several routes, only some of which were designated mail routes; over the latter the carrier operated both mail and non-mail schedules and with each schedule provided passenger and cargo services in addition to that of carrying the mail. The Commission was confronted with the problem of determining what portion of these combined services should be compensated through the mail payments.[11] The carriers contended that the mail compensation should be determined by deducting from their total costs of operation, plus a reasonable return on their investment, the non-mail revenue; the mail payments should equal the difference between the two.[12] The Post Office Department, on the other hand, advocated that the rates be based on each carrier's cost of carrying the mails only, and that this should be ascertained by allocating the carrier's total costs of operation among the mail, passenger, and cargo services.[13] The Commission rejected both contentions. The carriers' method would result in fixing rates for carriers, rather than for routes, contrary to Section 6(a) and would absorb in the mail rates the costs of all of the services, other than mail, which the carriers might choose to inaugurate. Over the latter, the Commission could exercise no control, either as to the

---

[10] 48 Stat. 933.

[11] From a cost standpoint, this presented three separate cost accounting problems: (1) the carrier's joint costs of operation had to be allocated between the designated mail and non-mail routes, (2) the costs attributable to the mail routes then had to be further allocated between mail and non-mail schedules, and (3) the costs attributable to the mail schedules had to be allocated to the mail, passenger and cargo services rendered by the carrier. The Commission faced these problems in its first air mail rate case: *Air Mail Compensation*, 206 I.C.C. 675 (1935).

[12] *Ibid.*, at 720. This would be treating, in effect, all non-mail operations and services as by-products of the assumed main product — the mail service. The revenue derived from the by-products would be credited to the total costs of operation to find the net cost incurred by the carrier for carrying the mail.

[13] The Post Office Department wanted to treat the three services as joint products; the joint costs of operation would be allocated to the three services on a pound-mile basis using as the ratio one of the following: (1) space, reduced to weight, available for each of the three services, (2) actual weight of each of the services, or (3) mail space contracted, reduced to weight, and actual weight for the other services. The cost thus assigned to the mail service would represent that portion of the carrier's operation to be compensated by the mail rate. *Ibid.*, at 722.

types of service or as to charges made by the carriers for such services. The strictness of the Post Office Department method would destroy all incentive for the maintenance and the future development of non-mail services.

The Commission resolved the rate-making problem by fixing the mail rates at a level which would provide each carrier with a fair rate of return on its investment in the mail routes after deducting the non-mail revenues from the total reasonable costs of operating such routes.[14] The Commission insisted that the resulting rates were not a matter of mathematical computations, but involved the exercise of an informed judgment.[15] While the Commission gave consideration to the factors listed in Section 6(e), it gave greater consideration to the carrier's revenue and expenses for each mail route. The "need" of each carrier was the predominant factor in each case; the same has been true for rates determined by the Civil Aeronautics Board under the Civil Aeronautics Act of 1938.

The Interstate Commerce Commission recognized that the carrier's cost of carrying the mail, where passenger and cargo services were also provided, could only be ascertained by some method of cost allocation whereby the carrier's total costs would be assigned to the various services according to some equitable method of allocation. But the Commission further recognized that if the passenger and cargo services were made to bear all of the costs that should be assigned to them, they would disappear from the airways and scheduled air transportation would revert to a contract carrier status—something Congress had been trying to prevent. It had been the policy of Congress to establish a sound air transportation system for passenger and cargo services as well as for mail. For this reason, the Commission refused to base the mail rates on the cost of the mail service rendered by each carrier on each route.[16]

Since 1938, the Civil Aeronautics Authority, later the Civil Aeronautics Board, has determined the mail rates. Section 406(a) of the Civil Aeronautics Act of 1938, as amended, directs the Board

> "(1) to fix and determine . . . the fair and reasonable rates of compensation for the transportation of mail by aircraft. . . .
>
> (2) to prescribe the method or methods . . . for ascertaining such rates of compensation for each air carrier or class of air carriers. . . ."

---

[14] The assignment of operating costs among several routes was left to managerial discretion, subject to adjustment by the Commission. *Air Mail Rates for Route No. 6*, 229 I.C.C. 357, at 366 (1938). The Commission approved the allocation of expenses on the basis of scheduled seat-miles, or on the basis of operated engine-hours or airplane-hours. *Air Mail Compensation*, 216 I.C.C. 166, at 175 (1936). The choice among methods depended upon the particular expense to be allocated: depreciation on the basis of engine-hours, traffic and advertising on the basis of seat-miles. *Air Mail Rates for American Airlines, Inc.*, 225 I.C.C. 12 at 20 (1937); *Air Mail Rates for Braniff Airways, Inc.*, 226 I.C.C. 752, at 760, 765 (1938).

[15] " . . . no precise mathematical weight was attached to any of these elements, either for the routes as a whole or for any individual route, nor were these bases and mileages determined as a result of any mathematical formula. Determination of the reasonableness of rates is not a matter of mathematical computation, but involves the exercise of an informed judgment." *Air Mail Compensation, supra* note 11, at 726.

[16] "If rates were fixed by the use of cost allocation at this time, all incentive for the maintenance and the future development of passenger traffic might be destroyed, and a tendency to revert to exclusive mail service might follow. The effect of efforts to reduce the cost of mail service by increasing the returns from passenger business would be lost. It is obvious that the time has not yet arrived when the passenger business of the contractors can stand alone." *Air Mail Compensation, supra* note 11, at 722.

In fixing and determining fair and reasonable rates, the Board is directed, by Section 406(b), to take into consideration, among other factors

> "(1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail;
>
> (2) such standards respecting the character and quality of service to be rendered . . . and
>
> (3) the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such services, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

In addition to the factors enumerated in Section 406(b), the Board must take into consideration the policies of the Act set out in Section 2; the need provision of Section 406(b) includes certain of the policy provisions of Section 2.

The provisions for rate-making in the present Act differ from those in the Air Mail Act of 1934 in that no top limit is placed on rates,[17] the Board is to fix rates for each carrier or carriers, rather than for each route,[18] and the Board is to take into consideration the interests of the air transportation industry and of the public in general in addition to the particular needs of the individual carrier.[19] The Board, as the Commission before it, has insisted that rate-making is not the result of a mathematical formula, but is the exercise of an informed judgment.[20] The relative weight given to each of the factors enumerated in Section 406(b) is difficult to determine; the Board has regarded the matter to lie solely within its discretion.[21] The Board decisions, however, indicate rather clear cut trends in the Board's handling of its rate-making duties.

Prior to 1942, the cases before the Board represented fact situations similar to those faced by the Commission: each carrier's operating costs exceeded its non-mail revenue. The need provision of Section 406(b) was the basis for offsetting this deficit with mail payments. In ascertaining, for each carrier, the "need" that should be allowed, consistent with Section 406(b) and required to carry out the policies of Section 2, the Board confined its investigation principally to three considerations: (1) the scope of the carrier's operations that should be included, (2) the amount of the carrier's costs that should be recognized, and (3) the amount of profit that should be allowed.

---

[17] 1938 Act, §406, 49 USCA §486 (Supp. 1946). 1934 Act, §3(a) authorized rates not exceeding 33⅓ cents per airplane-mile for a mail load not exceeding 300 pounds with an additional payment equal to 1/10 of the base rate for each additional 100 pounds; total payments were not to exceed 40 cents per airplane-mile. §6(e) required that the rates "shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom."

[18] 1938 Act, §406, *supra* note 17. *Chicago and Southern Airlines, Mail Rates for Route Nos. 8 and 53*, 3 CAB 161, 189 (1941).

[19] *American Airlines, Mail Rates*, 3 CAB 323, 335 (1942), "The use of the mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the postal service."

[20] *American Airlines, Mail Rates*, 3 CAB 770, 790 (1942).

[21] *Pan American Airways, Transatlantic Mail Rate*, 1 CAA 220, 253 (1939).

In the first cases handled by the Board, the mail rates were established for each designated mail route separately.[22] Where a carrier operated more than one mail route, it was necessary to allocate the joint costs of operation and non-mail revenue between the two or more routes. The non-mail revenue for each route has been assigned without difficulty. The costs that could be identified with each particular route have been assigned to those routes while the joint costs have been allocated to the routes according to the relative importance of the routes.[23] However, where a carrier inaugurated a service over a new mail route, the joint costs with another established route, for which the mail rate had already been determined, were not allocated to the two routes; instead, the Board considered only the additional costs in determining the mail rate for the new route.[24]

Where a carrier has operated both mail and non-mail schedules over a designated route, the Board has included the total cost of operating the route where the non-mail schedules were in the interest of commerce and the national defense, even though such schedules were not required in the interest of the Postal Service.[25] If, however, the Board thought that the added schedules were not necessary and did not meet any of the requirements of Section 406(b), the costs and the revenue of the non-mail schedules have been excluded for the purpose of determining the mail rate.[26] Where the cost of operating the non-mail schedules has been small, the Board has treated such schedules as by-products and only the out-of-pocket costs have been assigned to such schedules while the other costs have been recognized for rate-making.[27]

The problem of estimating the costs that a carrier will incur in operating the approved schedules over a mail route has involved no special consideration of cost allocation. The Board has based its estimate generally on the costs incurred in the past, projected into the future, and adjusted for

---

[22] This was true for 18 decisions rendered prior to 1941. In *Continental Air Lines, Mail Rates for Route Nos.* 29 *and* 43, 2 CAB 683 (1941) the Board stated that "no good purpose would appear to be served" by considering separately the two routes. Later, in *Chicago and Southern Air Lines, Mail Rates for Route Nos.* 8 *and* 53, 3 CAB 161 (1941) the Board, following its authorization under the Civil Aeronautics Act of 1938, discarded the route concept and established the air carrier as the primary unit around which the national air transportation system was to be developed through the instrumentality of air mail compensation. The transition from the route concept to the carrier concept was completed in *American Airlines, Mail Rates, supra* note 19.

[23] *Pan Am. Case, supra* note 21 (system expense allocated on basis of number of airports utilized by each route); *Western Air Express, Mail Rates,* 1 CAA 341 (1939) (indirect expenses allocated on basis revenue plane-miles and seat-miles flown); *Pennsylvania-Central Airlines,* 1 CAA 435 (1939) (direct expense allocated on basis of revenue-miles flown); *United Air Lines, Mail Rates,* 1 CAA 752 (1940) (variable expense allocated on basis of passenger revenue estimated). The several routes have generally been regarded as joint products. "The two services should be treated as coordinate and, as far as possible, the rate to be fixed for each service should take into consideration the proper apportionment of joint costs. Thus, the savings resulting from the operations of the two services at an aggregate cost less than the sum of the costs which would be incurred in two completely separate operations will be equitably apportioned." *Pan Am. Case, supra* note 21.

[24] *Mid-Continent Airlines, Mail Rate for Route No.* 48, 2 CAB 392 (1940).

[25] *Pennsylvania-Central Airlines, Mail Rate,* 1 CAA 435 (1939); *United Air Lines, Mail Rate,* 1 CAA 752 (1940). In 1942 all schedules were designated as mail schedules. *Braniff Airways, et al., Automatic Rate Adjustment,* 3 CAB 420 (1942).

[26] *Braniff Airways, Mail Rate,* 1 CAA 353 (1939); *Braniff Airways, Mail Rate,* 3 CAB 300 (1942).

[27] *United Case, supra* note 25; *TWA, Mail Rate,* 2 CAB 226 (1946).

changes that can be foreseen. The costs allowed have been only those that are necessary and reasonable.[28]

Where the Board excludes, for rate making, a part of the carrier's operations, the investment base, to which is applied a rate of return to determine the amount of the profit, is determined by allocating the carriers total investment between the approved and non-approved operations. The mail rate is so determined to provide the carrier with earnings sufficient to yield a fair rate of return, after federal income taxes, on the recognized investment.[29]

In 1942 the Board had its first opportunity to apply the principle of cost allocation to a carrier's joint costs of operation in order to ascertain the cost of the mail service as distinguished from the commercial services rendered by the carrier.[30] The Board found that the carrier under consideration could be expected to cover more than 98 per cent of its total operating costs by non-mail revenue. Since the carrier's "need" for mail revenue was at a minimum, the Board used the carrier's cost of the mail service as one of the factors upon which it based the mail rate. All costs relating only to commercial services were assigned directly to those services and all remaining costs were allocated between commercial and mail services on the basis of the relation of the number of pounds of commercial and mail services, respectively, to the total number of pounds carried. The carrier's pound-mile cost for all services was estimated to be .243 mill; of this the pound-mile cost of the mail was found to be .205 mill, while that for the other services .246 mill. The Board then set the mail rate at 12 cents per pound-mile for a base load of 300 pounds of mail to be computed on the direct airport-to-airport mileage. This would compensate the carrier for its mail service at the average rate of .358 mill per pound-mile for the total volume of mail traffic anticipated.

In this manner, the Board developed its rate-making procedure for a carrier no longer in need of governmental assistance in subsidy proportions. For this near self-sustaining carrier the Board shifted its primary concern from total costs, non-mail revenue, and investment to costs and investments allocable to the mail service.[31] Even though the need element was negligible, the Board could not establish a mail rate less than that required by the Constitution as the reasonable rate for the performance of the mail service.[32] The Board continued, however, its former application of Section 406(b) for the carriers less fortunate financially.

Soon thereafter, the Board was confronted with the problem of determining a mail rate for a carrier where the non-mail revenue exceeded the carrier's total costs of operation.[33] Here the Board again placed the primary emphasis on the cost of the mail service. By allocating the carriers total costs, which averaged .176 mill per pound-mile for all services, between the mail and commercial services on the basis of the ratio existing between

---

[28] For a treatment of this subject, see: Vanneman, *Recent Trends in Domestic Air Mail Rate Cases*, 14 JOURNAL OF AIR LAW AND COMMERCE 254 (1947).

[29] *Ibid.*

[30] *American Case, supra* note 19.

[31] "While the imperfections and inequalities in cost allocation have been universally recognized in the field of public utility regulation, and although neither the carrier nor Public counsel attempted in the instant proceeding to develop a basis for determination of the separate cost of transporting the mail, the record contains data upon which such a determination can be made with a sufficient degree of reasonableness to warrant its consideration along with other factors in our determination of the fair and reasonable rate to be paid the carrier." *Id.*, at 359.

[32] The minimum rate guaranteed the carrier by the Federal Constitution is based on the reasonable cost of rendering the service. *Id.*, at 334.

[33] *Eastern Airlines, Mail Rate*, 3 CAB 733 (1942).

the pound-miles of mail service and the pound-miles of commercial services rendered, after first charging to the commercial services those expenses attributable to those services only, the Board found that the cost would be .128 mill and .182 mill per pound-mile respectively; on the basis of direct airport-to-airport distances the estimated operating costs applicable to the mail service would be .132 mill per pound-mile. With this as the cost basis, the Board set the mail rate at .3 mill per pound-mile, or 227 per cent of cost. The Board gave as its reasons for fixing the mail rate so far in excess of the cost ascertained by a weight allocation that (1) the Post Office Department revenue from air mail exceeded the payments to carriers, (2) the priority and special nature of mail required a higher rate of return for its service, (3) the carriers had no control over the development of the mail service, (4) the rate of compensation for the mail services had been lowered progressively since the inauguration of air mail, and (5) the high degree of managerial economy warranted a higher rate of compensation to the carrier than normally would be required.

This decision drew the criticism of one of the Board members.[34] He considered the high rate of return that would accrue to the carrier from the .3 mill per pound-mile rate to be a Government subsidy for a carrier no longer in the "need" class; this he argued was not only contrary to the intent and spirit of the Civil Aeronautics Act, but was an unsound policy as well.

The Board used a similar cost analysis in determining the mail rates for other carriers which had reached, or were near, the self-sustaining status. Within two years, the Board established a uniform rate of .3 mill per pound-mile, or 60 cents per ton-mile, for eleven carriers,[35] even though the actual cost of the mail service, for the various carriers, computed on a cost allocation basis, varied from .128 mill to .234 mill per pound-mile.[36] The reason the Board gave for a uniform rate was that it hoped this would provide added incentive for economy and efficiency among carriers.[37]

In 1945, the Board moved away from the principle of basing the mail rates, for self-sustaining carriers, on the cost of the mail service; the mail rates for the four major carriers, previously set at 60 cents per ton-mile, were reduced to 45 cents per ton-mile.[38] The basis of the new rates, how-

---

[34] Mr. Harllee Branch.

[35] *Eastern Case, supra* note 33; *American Case, supra* note 20; *PCA, Mail Rate*, 4 CAB 22 (1942); *United Air Lines, Mail Rate*, 4 CAB 128 (1943); *TWA, Mail Rate*, 4 CAB 139 (1943); *Chicago and Southern Air Lines, Mail Rate*, 4 CAB 419, 529 (1943); *Western Air Lines, Mail Rate*, 4 CAB 441 (1943); *Hawaiian Airlines, Mail Rate*, 4 CAB 463 (1943); *Delta Air, Mail Rate*, 4 CAB 501 (1943); *Northwest Airlines, Mail Rate*, 4 CAB 515 (1943); *Braniff Airways, Mail Rate*, 4 CAB 588 (1944).

[36] The Board ascertained the costs, based on actual airplane-miles as follows:

Eastern	.128 (mill)	Chicago & So.	.170 (mill)
American	.136	Western	.174
United	.137	Northwest	.177
Delta	.143	P. C. A.	.204
Braniff	.159	Hawaiian	.234
T. W. A.	.163		

"The 'service' as opposed to the 'need' mail rate is not designed to meet the financial need of the individual carrier, but rather it is intended to be fair and reasonable in terms of both the quality of the service and the reasonable and necessary costs under conditions of economical and efficient management." *Eastern Air Lines, Mail Rate*, 6 CAB 551, 555 (1945).

[37] " . . . a uniform service mail rate provides added incentive for increased operating efficiency by making the rate of profit directly dependent upon each carrier's competitive performance as measured by the relation of its costs to the costs of other carriers . . ." *Ibid.*

[38] *Eastern Air Lines, Mail Rate*, 6 CAB 551 (1945); *American Airlines, Mail Rate*, 6 CAB 567 (1945); *United Air Lines, Mail Rate*, 6 CAB 581 (1945); *TWA, Mail Rate*, 6 CAB 595 (1945).

ever, was not the revised cost of the mail service for each carrier, or even the average cost of the mail service for the four carriers, but rather the "informed judgment" of the Board; the Board thought the dynamic conditions through which the air transport industry was passing required that the rates be the result of "judgment" rather than of allocated costs.[39]

Passenger and Cargo Rates

The Civil Aeronautics Act of 1938, as amended, gives the Board the power to regulate the fares and charges the air carriers may receive for the passenger and cargo services, in addition to the power to fix and determine the rates for the mail service. The carriers are to establish such charges in the first instance; these are to be just, reasonable and equitable, and are to be set out in tariffs published and filed with the Board thirty days before such charges are to go into effect.[40] The Board is empowered, upon complaint or upon its own initiative, to investigate such charges and to suspend the operation of the tariffs during such investigation.[41] If the Board should be of the opinion that any charge does not comply with the Act, it shall determine and prescribe just and reasonable rates. In exercising this power, the Board is directed by Section 1002(e) to take into consideration, among other factors

"(1) The effect of such rates upon the movement of traffic;
(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
(4) The inherent advantages of transportation by aircraft; and
(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."

The Board's control is patterned after similar provisions of the Interstate Commerce Act.[42]

The power given the Board to regulate the passenger and cargo rates has never been exercised directly,[43] nor has the Board undertaken a com-

---

[39] "Under existing circumstances, it would appear that the over-all costs provide a better basis for judgment in setting the mail rate than allocated costs. . . . We therefore conclude that no useful purpose will be served at this time by allocation of the over-all costs between the mail and the non-mail services." *Eastern Air Lines, Mail Rate*, 6 CAB 551, at 557 (1945). Mr. Branch concurred only in the new rates. He expressed approval of the reduction in mail rates, but criticized the manner in which the reduction was reached. He thought allocated costs should serve as the basis for determining the rates, and that the Board should shift from the reasonable costs of individual carriers to the reasonable average costs of the group as a unit.

[40] §§403, 404, 49 USCA §§ 483, 484 (Supp. 1946).

[41] §1002, 49 USCA §642 (Supp. 1946).

[42] Interstate Commerce Act, §15(a) (2), 54 Stat. 912, 49 USCA §15(a) (2) (Supp. 1946), Motor Carrier Act, §216(i), 54 Stat. 924, 49 USCA §316(i) (Supp. 1946).

[43] In 1940 a rate conference between the Board and the carriers was scheduled, but was eventually abandoned after the carriers requested an indefinite postponement; subsequently, the carriers did file briefs. Spencer, *op. cit. supra*, note 4. In 1943 the Board issued an order directing 11 domestic carriers to show cause why the passenger rates should not be reduced 10 per cent. Docket No. 850, Serial No. 2164 (Feb. 27, 1943). Following a voluntary reduction in rates, the order was finally dismissed. Serial No. 2302 (June 15, 1943); Serial No. 5102 (Aug. 21, 1946). The passenger rates were subsequently increased 10 per cent. Order Approving Agreement Relating to Passenger Fares, Agreement No. 996, Serial E-389 (Mar. 21, 1947).

prehensive investigation of such rates, even though it expressed an intention to do so as early as 1942.[44] Recently the Board did suspend certain cargo tariffs and promised to investigate air cargo rates and costs.[45] The Board has stated that the rates established by the carriers should bear some relation to the cost of rendering such services, but prior to its recent action, has made no effort to see that this principle is followed.[46] The control the Board has maintained has resulted indirectly from the consideration the Board has given to the non-mail revenue of a carrier in ascertaining the need of the carrier for mail compensation.[47] The discretion exercised by each carrier in fixing its fares and charges in order to maximize its non-mail revenue has been considered to reflect on its efficient management.[48]

CONCLUSION

Congress has given the Civil Aeronautics Board the power to fix and determine, or approve of, the rates the air carriers may receive, or charge, for the mail, passenger, and cargo services. In exercising this power Section 2 of the Civil Aeronautics Act requires that the Board consider as being in the public interest

> "The regulation of air transportation in such manner as to . . . foster sound economic conditions in such transportation. . . . The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. . . ."

The Board can "foster sound economic conditions" in the air transportation industry only by requiring that each of the three types of service bears its proper share of the total cost of operation of the industry.[49] The allocation of the total costs to the three types of service and the establishing of

[44] "The matter of passenger rates, of course, cannot be acted upon in this proceeding, but we bring it forward for attention and it should have early consideration." *Eastern Case, supra* note 33 at 757. Also: *American Case, supra* note 20; *PCA, Mail Rate,* 4 CAB 22 (1942); *United Air Mail Rate,* 4 CAB 128 (1943). Mr. Branch dissented to the dismissal of the 1943 show cause order, note 43 *supra,* on the grounds that all rates — mail, passenger, and cargo — should be considered in a comprehensive investigation. Serial No. 2302 (June 15, 1943).

[45] Petitions of *Slick Airways, Inc., et al.,* Docket Nos. 3170, 3178, Serial No. E-916 (Oct. 24, 1947); *Investigation of air freight rates,* Consolidated Docket, Serial No. E-1016 (Nov. 20, 1947).

[46] The Board disapproved the trans-Atlantic rates since they were not related to cost, *Resolution of North Atlantic Traffic Conference,* 6 CAB 845 (1946). The Board previously approved the Conference assuming that the rates it would establish would relate to costs and would be reasonably and economically sound, *International Air Transport Association Traffic Conference Resolution,* 6 CAB 639 (1946). Mr. Branch dissented from the Board's order cancelling Pan American Airways reduction in travel discounts for Government employees on the ground that the cost of transporting a Government employee is the same as the cost of carrying any other person; each receives the same service; the discounts discriminated against non-government employees, *Government Travel Discount Tariff Investigation,* Docket No. 1941 (Apr. 18, 1946).

[47] *Western Air, Mail Rate,* 1 CAA 341 (1939) (reduction in local passenger fares held constructive experiment).

[48] "Though it is far from our intention to disapprove or discourage a reasonable amount of experimentation with the effect of fares upon traffic, in the endeavor to discover the rates of fares and tariff practices which will give the air transport industry its soundest economic position, any unreasonable course in that regard must have an important bearing upon the appraisal of the commercial requirements of the service involved, and upon the appraisal of the managerial economy and efficiency displayed by the carrier." *Northwest Air Lines, Mail Rate,* 1 CAA 259, at 283 (1939).

[49] The carriers have consistently denied their ability to make such cost allocations and have refused to submit data. *American Airlines, Mail Rate,* 3 CAB 770 at 790 (1942). In *Eastern Air Lines, Mail Rate,* 3 CAB 733, at 753 (1942),

rates related to costs is likewise necessary to prevent "unjust discriminations" against any class of user of the various services.[50] The method of allocation that the Board should eventually follow can only be determined by conducting a comprehensive investigation of the three services to ascertain the nature of each service and how each is affected by economic factors of supply and demand, the relation that each service bears to the others and to the industry as a whole, the effect of the rate level upon the movement of each class of traffic and the effect different methods of cost allocation may have on the development of the industry.[51]

The Board, on occasions, has treated the mail, passenger, and cargo services as joint products of the transportation industry.[52] In determining the mail rates for carriers no longer in the "need" class, the Board has allocated the total costs of the joint services on the basis of ton-miles of service rendered by the mail and commercial services, to determine the cost of the mail service; the cost thus obtained was a factor the Board considered in fixing the rates for the mail service.

In establishing the mail rates for carriers still in the "need" category, the Board has treated the commercial services as by-products of the carriers with the mail service designated as the main product.[53] The revenue from the commercial services has been applied against the carrier's total costs of operation to ascertain the "need" of each carrier for mail compensation. In following this practice, required by Section 406(b), the

---

the carrier's assistant secretary-treasurer testified that "it is not at all feasible and practically impossible" to make an allocation of joint costs. But the carrier's system for allocation of joint costs has been explained at other occasions. T. J. Dunnion (Vice-Pres., Treasurer for American Airlines, Chicago), *Accounting For Air Transportation*, 19 Nat. Cost Accts. Ass. Bull. 1352 (1938); M. W. McQueen (Auditor, Trans. & Western Air, Kansas City, Mo.), *Accounting For Air Transportation*, 23 Nat. Cost Accts. Ass. Bull. 345 (1941). Also see: Baily, *Specialized Accounting Systems*, p. 408 *et seq.*, Wiley & Sons, New York (1941).

[50] A comparison of rates, fares, and charges of domestic air carriers per ton-mile of mail, passenger, and cargo from 1940 to 1946 is as follows:

Year Ended June 30	*Mail*	*Passengers*	*Cargo**
1940	$2.09	$0.51	$0.60
1941	1.88	.51	.59
1942	1.51	.50	.55
1943	.79	.55	.59
1944	.66	.52	.49
1945	.58	.52	.49
1946	.54	.47	.42

* Includes express cargo only; freight cargo for 1946 was 34 cents.
Source: CAB Annual Report, 1946.

[51] The need for relating rates, fares, and charges to costs of the services has been suggested by others: PUFFER, *op. cit. supra* note 4 at 365; SPENCER, *op. cit. supra* note 4; Neal, *Some Phases of Air Transport Regulation*, 31 Geo. L.J. 355 (1943); Burt and Highsaw, *Regulation of Rates in Air Transportation*, 7 La. L. Rev. 1, 378 (1946, 47). "I believe that a sound permanent policy requires that service mail rates be closely related to the costs of the mail service . . . " Mr. Branch, concurring in *Eastern Air Lines, Mail Rate*, 6 CAB 551, at 560 (1945). "Control of passenger and express rates has been left largely in the hands of the air lines and many inconsistencies have resulted. Yet the rates which the carrier charges the public for other classes of service cannot be disassociated from the problem of fixing air-mail rates. They are alternative methods of effecting gross income and must be made to work harmoniously. Consideration should be given to fixing passenger and express rates at optimum levels consistent with the basic policy for the industry." *Transportation and National Policy*, National Resources Planning Board, p. 357, May, 1942.

[52] For a treatment of joint product accounting, see: DOHR, INGHRAM AND LOVE, COST ACCOUNTING (1935), 446 *et seq.*; VAN SICKLE, COST ACCOUNTING (1938), 542 *et seq.*

[53] For a treatment of by-product accounting, see DOHR, INGHRAM AND LOVE, *Id.* at 440 *et seq.*; VAN SICKLE, *Id.* at 549 *et seq.*

Board has called attention to the fact that the mail rate thus established included a government subsidy in addition to compensation for the mail service.[54] Congress enacted Section 406(b) specifically for this purpose.

In determining if it should grant the recent request of a major carrier for a mail rate of $1.25 per ton-mile while the same carrier intends to charge as little as 14 cents per ton-mile for its cargo service, the Board must decide whether the two services should be regarded as joint products of the carrier or whether the cargo service should be considered a by-product of the carrier's main services.

Here, the method of performing the cargo service is important. To the extent that the cargo service can be maintained in conjunction with and subsidiary to the regularly required mail and passenger services, the former could be regarded a by-product of the latter. As long as the cargo revenue exceeds the additional cost incurred in rendering the cargo service, the mail and passenger services would not be affected adversely and incentive cargo rates would appear proper. But, where the cargo service constitutes an important phase of the air transportation industry, and is carried in part by separate cargo aircraft, it should be required to bear its share of the total cost. The savings that result from rendering the mail, passenger, and cargo services jointly should benefit all services; the reduction in the cost of rendering these services should result, eventually, in lower rates and charges to the users of these services. Since weight is generally regarded to be the limiting factor in rendering services by air, all other factors being equal, the cost and the resulting rates for the different services should approximate one another. Since the mail must be given expeditious handling and schedules must be maintained to meet the needs of the Post Office Department, notwithstanding the decreasing percentage mail bears to the total air lift, a higher rate per ton-mile for mail service may continue to be justified and these factors will have to be considered by the Board, along with others, in determining whether a mail rate twice that charged for the passenger service and nearly nine times that charged for the cargo service could be found to constitute a burden and discrimination against the government.

ROLAND W. PORTH*

PRACTICAL VALUE OF AN APPEAL UNDER SECTION 1006(e) OF THE CIVIL AERONAUTICS ACT

Section 1006(e) of the Civil Aeronautics Act of 1938[1] provides that, on judicial review of a Civil Aeronautics Board order, ". . . findings of facts by the Authority (the Board), if supported by substantial evidence, shall be conclusive." The meaning of "substantial evidence" has been set forth as "more than a mere scintilla . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] Section 1006(e) has been tested only four times in the ten-year life of the Civil Aeronautics Act, twice in cases involving violations of the Civil Air Regulations[3] and twice in economic cases.[4]

---

[54] *Chicago and Southern Air Lines, Mail Rates for Route Nos. 8 and 53*, 3 CAB 161, 188 (1941).

* Graduate Northwestern University Law School, September 1947; Member of Illinois Bar; Certified Public Accountant; Assistant Professor in Accounting and Business, Southern Methodist University. This Note was prepared for the Seminar in Transportation Law.

[1] 52 Stat. 1024 (1938), 49 USCA §646(e) (Supp. 1947).

[2] *Consolidated Edison Co. of New York v. National Labor Relations Board*,

[3] *Cameron v. Civil Aeronautics Board*, 140 F. 2d 482 (C. C. A. 7th, 1944); *O'Carroll v. Civil Aeronautics Board*, 144 F. 2d 993 (App. D. C. 1944).

[4] *Braniff Airways, Inc. v. Civil Aeronautics Board (Essair, Inc., Intervenor)*, 147 F. 2d 152 (App. D. C. 1945); *United Air Lines v. Civil Aeronautics Board*, 155 F. 2d 169 (App. D. C. 1946).

Of the two safety cases, only one evoked much in the way of discussion of the evidence by the reviewing court. In *Cameron v. Civil Aeronautics Board*,[5] an Army test pilot, accused of "buzzing" the control tower of the Indianapolis Airport, waived his right to a hearing, preferring to rely on written statements. His evidence consisted of statements by him and two other officers, passengers in his plane, that the maneuver was merely a standard technique for informing the tower operator of radio trouble, and requesting landing instructions, and his record of thirteen years of flying, including 3,700 airline hours. The Board relied on the statements of the Chief Airport Traffic Controller and a CAA Inspector that the plane came in cross-wind across the airport at an altitude of less than 500 feet. This was substantial evidence in the court's opinion, particularly since the final determination of credibility of testimony is made by the administrative board.[6] In the other case, *O'Carroll v. Civil Aeronautics Board*,[7] the pilot had taken off while another pilot was taking off ahead of him on the same runway. Appeal from the board's suspension of his commercial certificate was based on two grounds, the first of which was lack of substantial evidence. The court's discussion was as follows, "As to the first point we have examined the record and find ample evidence to support the Board's finding of negligence." The case was fairly clear, since the Board had in support of its order the testimony of the other pilot and several disinterested eye witnesses. The appeal seems to have been ill-advised, since the case apparently was not even close.

In the first of the economic cases, *Braniff Airways v. Civil Aeronautics Board (Essair, Intervenor)*,[8] occurred the only reversal; and that came about only as a result of special conditions incident to World War II. The Board's finding that the Essair company, a competitor of Braniff for west Texas feeder service, had the proper organizational basis for the conduct of air transportation was based on the presence of its president. Shortly after the granting of the certificate, he was called into the Air Force. Braniff, when apprised of this, sought a rehearing, which was denied. By the time the appeal was finally heard, the former president was serving overseas. The court held that the finding, while supported by substantial evidence when made, had to be put upon some other foundation, since the evidence had been rendered unavailable for the duration. This case, then, was clear, and was not complicated by the interplay of issues of policy and expertise.

United Air Lines v. Civil Aeronautics Board,[9] which was argued on the questions of the sufficiency of the findings and the evidence supporting them, presented the typical problem in economic cases—can a finding of fact be considered purely as such, without regard to its context? Here four air carriers had applied for the new Denver-Los Angeles route, and the selection of a carrier was narrowed to United or Western Air Lines. The trial examiner awarded the route to United, but the Board reversed him, awarding it to Western,[10] and the Board was affirmed on appeal. It was conceded by the Board that the public interest would be served by single-plane service, *i. e.*, through service between Los Angeles and the eastern cities through Denver. The transcontinental route through Denver followed the great circle intersecting New York and Chicago, which United

305 U.S. 197, 229 (1938).

[5] 140 F. 2d 482 (C. C. A. 7th, 1944).

[6] *National Labor Relations Board v. Link-Belt Co.*, 311 U.S. 584, 597 (1941).

[7] 144 F. 2d 993 (App. D. C. 1944).

[8] 147 F. 2d 152 (App. D. C. 1945).

[9] 155 F. 2d 169 (App. D. C. 1946).

[10] *Western Air Lines, Inc., et al., Denver-Los Angeles Service*, 6 CAB 199 (1944).

already operated as far as Denver, while the only two existing transcontinental through routes to Los Angeles (TWA and American) went far to the south. The Board, however, subordinated this consideration to that of maintaining Western as a strong regional carrier. United's bid for a single transcontinental service accordingly was rejected.

The Board's reasoning was that an award to United would divert so much traffic from Western's Los Angeles-Salt Lake City route, sustained mainly by a connecting service with United, that its solvency would be threatened.[11] Further, it found that an award to Western would keep it in a healthy financial state.[12] Both of these findings, which were necessarily predictions, were challenged by United. The former finding, on which the concurring member disagreed, was based on the fact that about 80% of the Western traffic between Los Angeles and Salt Lake City originated or terminated in cities east of Denver,[13] and on an estimate by Western that United's operations would divert over 40% of Western's total revenue passenger mileage.[14] United questioned this estimate with some vigor, but its main attack was directed at the finding that Western could operate the route at a profit. Here the complexities of the facts were most manifest.

United and Western had operated an interchange service at Salt Lake City from 1940 to 1942, when war conditions required its termination. The parties agreed that the arrangement was no longer binding, and the service had not been renewed. While the Board denied that it was relying on an interchange arrangement at Denver, suggested by Western, to accommodate the 80% through passengers,[15] its finding that Western would thrive with the new route was based on an estimate by Continental (one of the four applicants) of profits to be made by Continental from a Kansas City-Los Angeles route, via Denver, with a connecting service at Denver with United's existing Chicago-Denver route,[16] and on actual records of Western's Salt Lake City-Los Angeles operations.[17] United on appeal argued that the evidence offered by Continental proved nothing as to Western, since Continental's estimate assumed that most traffic would pass through Denver from Kansas City to Los Angeles and vice versa, with the United connecting service at Denver only incidental, and further

---

[11] "On the basis of the evidence of record we conclude that award of the new route to United would divert so much traffic from Western as to seriously impair that carrier's ability to continue as a strong independent air carrier in a position to compete for traffic in the western section of the country." 6 CAB at 210.

[12] "An examination of these estimates leads to the conclusion that any one of the applicants should be able to conduct the proposed service in conjunction with its system operation on an economically sound basis and without need of Government aid in the form of mail payments in excess of a compensatory rate." 6 CAB at 206.

[13] ". . . about 80% of the total traffic which may be expected to move over the Los Angeles-Denver route will be destined to or will originate at points east of Denver on United's transcontinental route." CAB at 209.

[14] "On this basis Western estimated that United would divert 48.9% of its revenue passenger mileage from route 13 (Los Angeles-Salt Lake City) and 41.7% from its system." 6 CAB at 210.

[15] The Board in its opinion said, "These estimates were based on the assumption that interchange arrangements would be made. The record contains no estimate of revenues and expenses for a connecting service. However, in view of the fact that such a service is much less attractive than the through service that would be available by other routings, it is certain that the volume of traffic and expenses would be considerably less than that estimated by Western." 6 CAB at 205. In its brief on appeal, however, the Board stated that it had found that connecting service would be profitable, and that it could make such a finding because of its expert knowledge, without specific evidence on the point. Brief of Respondent, Civil Aeronautics Board, at p. 29.

[16] Brief for Respondent, Western Air Lines, Inc., p. 42.

[17] 6 CAB at 204; Brief for Respondent, Western Air Lines, p. 42.

that Western's evidence of its own operations in connection with United included the period in which the interchange operation was in effect. Thus, the appeal presented two alternative interpretations of the Board's opinion: (1) Western would prosper in a connecting service with United at Denver —although no evidence indicated this; or (2) Western would prosper in an interchange service with United at Denver—although there was no evidence that an agreement for such service would be entered into. The conjectural aspect of the findings is highlighted by the frequent reference by the Board in its briefs to expert knowledge or the equivalent.[18]

The court, emphasizing "the paramount public interest" in the case,[19] held that the Board's findings, though general in terms, were sufficiently clear, were supported by substantial evidence, and were adequate to sustain the award of the certificate to Western. As to United's argument[20] that Continental's estimate of profitable operation of the route did not apply to Western's situation, since Continental based its figures in considerable part on traffic using its existing Denver-Kansas City operation (a route which neither Western nor United had) the court said merely, "Continental's traffic estimate was based on a connecting service."[21] United pressed the point[22] that Western's own estimate that it could operate the route profitably was based upon results of the earlier interchange operation between Western and United at Salt Lake City, whereas there was no evidence that a like interchange arrangement between the two would recur at Denver, particularly since interchange required consistent duplication of equipment, a condition almost impossible to maintain. This, too, the court disregarded, despite the fact that it noted that Western's figures were "heavily weighted with the (Salt Lake City) interchange operation, August, 1940, to May, 1942."[23] This represented virtually all of the attention which the court gave to the substantial evidence argument made by United. The greater part of the opinion was devoted to an emphasis upon the paramount public interest in the case as exemplified by Section 2 of the Act,[24] and the "general nature of the problem" as presenting essentially "a

---

[18] Brief for Respondent, Civil Aeronautics Board, pp. 14, 15, 21, 29; Memorandum in Response to Point II of Reply Brief of Petitioner, p. 2 (twice).

[19] 155 F. 2d at 173. For a discussion of paramount public interest in new route cases see Note, 14 J. Air L. & C. 117 (1947).

[20] Reply Brief for Petitioner, United Air Lines, Inc., pp. 5, 14.

[21] 155 F. 2d at 174.

[22] Brief for Petitioner, United Air Lines, Inc., pp. 18, 36, 37, 41.

[23] 155 F. 2d at 174.

[24] "Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

task for administrative judgment."[25]

In other fields of Federal regulation, the mixed question of law and fact has opened the door to the reviewing court to evaluate the validity of the administrative action,[26] where a pure finding of fact would have imposed the substantial evidence rule[27] or complete finality of the findings.[28] In only one instance has there been a weighing of evidence of a nature similar to that involved in the *United* case. In *Courier Post Publishing Co. v. Federal Communications Commission*,[29] the Commission had considered an application for a broadcasting license in a growing city, and had denied it. Against a considerable body of evidence showing need for such a service, the Commission had relied on the contrary testimony of an officer of a radio station of limited capacity in a small neighboring town—the only station of any kind within 50 miles. The reviewing court reversed, finding that, though the Commission had based its finding of absence of need on some evidence, that evidence was not substantial. Interestingly enough, this also was evidence of a speculative or conjectural type.

To what extent may the substantial evidence rule be used as a vehicle for appeal under Section 1006(e) of the Act? It appears clear that the Board will be treated in safety cases just as a lower court would be (these are actually no more than misdemeanor trials). As for economic cases, the *United* opinion indicates that there will be a mixture of fact and law in any finding in a certification proceeding. It seems that section 2 of the Act is inextricably interwoven into all Title IV deliberations of the Board, and that all fact findings are also findings of public convenience and necessity, set out so carefully in section 2.

Unhappily for the air carrier litigant seeking judicial review, a distinction, made obvious in the *United* case, can be drawn between Civil Aeronautics Act cases and decisions under most other Federal legislation. The distinction is found in the court's reaction to the careful spelling out of the meaning of public convenience and necessity in that Act. All other federal legislation leaves that work to the administrative process. The appellant of Board decisions is faced with a specific legislative mandate, not open to judicial construction, but to be implemented and interpreted solely by the special body appointed to administer it. Therefore, it is reasonable to conclude that the ubiquity of section 2 in economic cases, and the aura of legislative finality which surrounds it, make the substantial evidence rule under the Act almost, if not entirely, a rule of administrative finality. This provision in the Civil Aeronautics Act means, further, that the Administrative Procedure Act[30] probably effects no change in economic cases.[31] Only a complete revision of the Civil Aeronautics Act, including elimination of section 2, would broaden the scope of judicial review; and such a revision does not seem probable.[32]

ROBERT F. DAILY*

---

* Student, Northwestern Law School, Competitor, Legal Publication Board.

[25] 155 F. 2d at 175.

[26] *Dobson v. Commissioner*, 320 U.S. 489 (1943) (Tax Court fact findings are conclusive; no review at all); *Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 Harv. L. Rev. 753 (1944); *United States v. Idaho*, 298 U.S. 105 (1936) (ICC).

[27] *New York v. United States*, 331 U.S. 284 (1947). Expert knowledge has its effect at p. 326: "We could not disturb its (ICC's) findings on the facts of this record without invading the province reserved for the expert administrative body."

[28] *Dobson v. Commissioner*, 320 U.S. 489 (1943), note 23 *supra*. But see *Lincoln Electric Co. v. Commissioner*, 162 F. 2d 379 (C. C. A. 6th, 1947); Note, 42 Ill. L. Rev. 794 (1948) (Administrative Procedure Act may now apply the substantial evidence rule to Tax Court findings).

[29] 104 F. 2d 213 (App. D. C. 1939).

[30] 5 USCA §§1001-1011 (Supp. 1947), 60 Stat. 237 (1946).

[31] There is tacit approval of §1006(e) in the legislative history, in that there is no mention, much less criticism, in Administrative Procedure in Government Agencies, Sen. Doc. 10, 77th Cong., First Sess. (1941).

[32] The latest word on revision of the law, contained in the Congressional Air Policy Report, calls for organizational changes, but says nothing about deleting §2. Sen. Rep. 949, 80th Cong., Second Sess., March 1, 1948; Comment, 15 J. Air L. & C. 208, 217-224 (1948).

BOOK REVIEWS

PERSONAL AIRCRAFT BUSINESS AT AIRPORTS, by Lynn Bollinger and Arthur H. Tulley, Jr. (Harvard Business School, Division of Research, Soldiers Field, Boston 1948, pp. xiv, 348. $4.25.)

One does not read far in "Personal Aircraft Business at Airports" before realizing that the story unfolded in this book presents a valuable key to the sound development of aviation. The volume contains an analytical study of personal aircraft, sales and service operations in the United States, based upon first hand information obtained by the authors and their associates from investigation of 180 fixed base operations in 40 states. Additional basic data was collected through discussion with municipal, state, and CAA officials.

The authors present along with their analysis of the current fixed-base operator's dilemma, many helpful suggestions for correcting the plight of the personal aircraft business. For instance, they point out that present day personal airplanes and courses of flight training differ very little from the Jennies of 1918 and World War I training methods respectively. A so-called modern vehicle is plagued in its development by being patterned after an airplane which for military purposes was heavily constructed, required a large landing area, and was designed to do spins and stalls. Therefore, if the personal aircraft business is to have a firm footing for development, aircraft manufacturers must produce aircraft which are utilizable, practical, safe, transportation vehicles and are not merely instruments designed for training the military.

Unlike some Harvard Business School publications, this Personal Aircraft volume covers the subject matter with purposely broad intent. The report is divided into 3 parts. Part I, which is entitled "The Essential Characteristics of the Business and Its Products," contains a report of the characteristics and basic problems, gives a historical development of the problems of growth of the business, and thereby, to a certain extent, forecasts what is to be found in Parts II and III.

"Financing and Management of Fixed-Base Operations" is the subject discussed in Part II. The businesses analyzed to compile this part range in size from the one-pilot-instructor-and-one-airplane-renting-space-in-hangar to the operation which totals hundreds of thousands in investment. It is most interesting to note that many of the larger installations surveyed are owned and operated by men who have succeeded in other and often unrelated industries. Their attraction to aviation has been due to the following causes, first, a belief in future expansion of a new industry, and second, a fascination (perhaps unbusiness-like, but nevertheless most cheering to one's thoughts) for engaging in the business of operating aircraft. Sufficient reasons are given for this successful man's participation to recommend that all of approximately 8000 fixed-base operators in the United States today should seek out and obtain the services of the best business men in their communities as advisers and directors of their aviation interests.

Part II is of particular interest to the fixed-base owner. In it one will find a complete analysis and break down of the costs allocable to the various departments of the fixed-base operation—flight, maintenance shops, and concessions. Cost and control systems used for general aircraft operations are given a thorough review and highlight the fact that every owner must make a similar study to assure profitable utilization of the various divisions of his operation. The authors point out that many operators are actually losing money on departments which they believed to be profitable

simply because they failed to properly allocate operating expenses.

Part III, "Fixed-Base Operations at Publicly Owned Airports," endeavors to answer the many questions which confront those operators who would seek to take advantage of the benefits of the Federal Airport Program. Here are presented workable solutions to problems discussed by the hour when administrators of municipal government, state aviation directors, fixed-base operators, and CAA officials meet. Many interesting tables and facts are added in appendices to the book.

A first impression of this book would prompt one to believe that it will be used mainly as a reference by fixed-base operators. After having completed reading the book however, the reader realizes that there are many others who could read it with profit. "Others" are municipal and state officials, airport managers, manufacturers of aircraft, and those who guide CAA policy. The average fixed-base operator might do well to open this book at Chapter 8 which has the provocative title, "Profitability of Fixed-Base Operations." The facts divulged there will not put at ease the mind of a man who may have thousands of dollars invested in flight operations, airplane sales and service. The next step for this operator reader, providing he can hold to the task of comparing his business with the many fixed-base operations reviewed, will be to read all of Part II with a coldly analytical eye. Prior to completing this part, he will have pencil and notebook at hand and will have set down and noted phases of his own business for an evaluation study. He will have many ideas for readjusting his own operation.

While reading the book, the reader's thoughts will again and again return to the contents of Part I. There the future is arraigned before the mistakes, efforts, and background of the past. That the surplus aircraft of World War I retarded the development of the airplane and forced a trend which is still controlling aviation progress is unquestioned. On the other hand is it fair to say that the OX-5 engine and the Jennies were insurmountable obstacles beyond which the science of aeronautical engineering could not pass? Similarly, could this period of retarded development properly be recognized as a part of the cycle of development of any new form of transportation. We have the super-pilot and buzz-boy counterpart in the auto era, the Indianapolis Speedway Races of pre-World War I days, and the bicycle "scorchers" of the 1890's were undoubtedly the devils of their day.

The question capably developed and raised by the authors is: "Where does the personal aircraft business go from here?" All those persons interested in the development of aviation can thank the authors for presenting the answer to the question in the same volume. We must treat the personal airplane as a means of transportation beginning now. Every flight, all of our thoughts, and all of our plans must be directed toward that end. If this program is followed, we will find the personal airplane can assume maturity as a form of transportation quickly, perhaps within half a decade.

CHARLES E. COX, JR.*

THE STORY OF AIR TRANSPORT, by Jim Ray. (Philadelphia: The John C. Winston Co., 1947, pp. 104. $2.50.)

In this volume Mr. Ray presents a brief and interesting history of the development of air transport in the United States. The eleven chapters deal with the development of transportation in this country, the success of the Wright brothers, the initial efforts in air mail transport, the expansion of air mail service and construction of airways, the beginnings of passenger air transport, the expansion following the return to private transportation of air mail in 1934, the services of air transport companies and

* Assistant to Regional Administrator, Third Region, CAA, Chicago, Ill.

personnel in World War II, postwar aircraft, the inauguration of air freight service, the establishment of feeder lines and helicopter mail service, and recent developments in passenger service and safety.

The book is written in popular style and is intended for people with a general interest in the subject rather than for students of the field. Approximately 100 illustrations and diagrams are included. It will be useful in stimulating in young readers an interest in air transportation.

H. W. T.

WORLD AVIATION ANNUAL—1948, by J. Parker Van Zandt, Editor-in-Chief and John C. McClelland, Executive Editor. (Published jointly by Aviation Research Institute, 903 16th St. N.W., Washington, D. C. and the James Jackson Cabot Professorship of Air Transportation of Norwich University, Northfield, Vermont, 1948, pp. 544. $17.50.)

In this, the first edition of the World Aviation Annual, policy makers and students of every phase of worldwide aviation—manufacturing, transport, airports, economics and regulation to name a few—are rewarded with a unique condensed compilation of heretofore hopelessly scattered data.

The text is divided into ten major segments. Part I gives the World Perspective including worldwide passenger and postal traffic, world aviation organizations: ICAO, UPU and FAI and a presentation of multilateral aviation agreements. The succeeding eight sections cover specific geographic areas: Part II—North America, Part III—Greater Europe, Part IV—Middle America, Part V—South America, Part VI—Africa, Part VII —U.S.S.R., Part VIII—Asia, Part IX—Oceania. The final Part X is entitled "Economic Notebook" but treats only the Uniform System of Accounts as prescribed by the U.S. Civil Aeronautics Board and certain selected characteristics of some of the airlines of the United States. The appendix is made up of a metric-English conversion table, the system of symbols employed in U.S. aircraft designation and a compilation of aviation records.

In each of the geographical divisions of the text, the countries embraced are dealt with in alphabetical order. For each individual country, insofar as available, data have been presented in a standard pattern: organization (government and non-government agencies), military aviation, aviation history, international agreements, manufacturing (major airframe, engine and accessory manufacturers with thumbnail sketch of history, products and production and financial data), aeronautical imports and exports, scheduled airlines (historical development, capitalization, management, routes, personnel, equipment, operating and traffic statistics), non-scheduled airlines, airports and airways, other civil aviation activities and air travelers' guide (best season for travel, rates of exchange, entry requirements, etc.). For ready reference, each page carrier the country name and the subject treated.

The treatment of United States aviation is understandably extremely detailed, taking up more than 200 pages of the text. The detail of the coverage given all of the other countries is generally proportionate to their importance as factors in world aviation and the availability of data on them. Of especial interest to many, although necessarily brief, is the report on Soviet aviation which was written by the specialist, Ellsworth L. Raymond.

Throughout the statistical tables both English and the metric units are given with the latter being the common denominator. Similarly, cost and revenue figures are generally presented in United States currency with conversion rates noted.

The scope and detail of the Annual's presentation may be evidenced by a few random examples:

> "Generally speaking, every sizeable Soviet city is served by air transport. The fare from Moscow to Vladivostok, for example, is $323 at the official rate of exchange, or about 6½c per mile. On short runs fares average 8½c per mile. (Average domestic American rate is about 5c per mile)." . . .
>
> "Alaska has more civil aircraft registered in proportion to its population than any other state, territory, or country in the world. (Alaska, p. 284)." . . .
>
> "KLM, the Royal Dutch Airline, employs pilot personnel of 12 different nationalities, including 50 Canadians, 32 Australians, and 22 Americans. (Netherlands, p. 354)." . . .
>
> "At least three Italian aircraft concerns are reported to be working closely with Argentine companies in the production of aircraft, engines, and aeronautical instruments in Argentina. (p. 474)."

Doubtless in so comprehensive a project, certain inadequacies and inaccuracies are inevitable but they appear to be few and far between. It is hoped and assumed that future editions may be more liberal in specifying the sources of data. Irrespective of this or any other picayune criticism, the World Aviation Annual is a monumental reference work of unique utility for all the aviation world. It fills a great and long standing void in aviation reference literature.

E. J. FOLEY*

* Assistant to Vice President, American Airlines.

BIBLIOGRAPHY

CURRENT LITERATURE ON AVIATION*
BOOKS AND PAMPHLETS—A SELECTED LIST

Airport Operators Council. PAPERS PRESENTED AT THE FIRST ANNUAL MEETING, Boston, Mass., April 1-3, 1948. New York, 1948. 114 p.

Papers on development of non-flight revenues; airport fiscal policy; CAA regulation, air mail, ICAO activities affecting U. S. airports, management problems at airports of entry, gasoline storage and distribution at airports, airports and the non-scheduled and contract carriers, ground transportation of passengers and cargo, airports and scheduled carriers, etc.

Bollinger, Lynn Louis and Tully, Arthur H., Jr. PERSONAL AIRCRAFT BUSINESS AT AIRPORTS. Boston, Harvard University, Graduate School of Business Administration, 1948. 359 p. $4.25.

A study of the problems encountered by the small private aircraft businesses. The report is based on an investigation of 180 fixed-base operations in 40 states. Reviewed by Charles E. Cox, Jr., page 370 *supra.*

Breakiron, P. L. and Hoecker, R. W. PATTERN FOR DEVELOPMENT OF AIR FREIGHT BETWEEN UNITED STATES, ALASKA, AND CANADA. Hagerstown, Md., Fairchild Aircraft, 1947. 24 p.

The total present or past volume of commodities shipped to Alaska by surface carriers cannot be used to measure the size of present or future Alaska air market . . . chief adverse factor is lack of commodities for backhaul . . . there is a greater per capita need in Canada for air freight than in the United States . . . the St. Lawrence area consumes and produces the greatest volume of air commodities. Contains tables and maps.

Canada. Department of Transport. ANNUAL REPORT . . . for the fiscal year from April 1, 1946 to March 31, 1947. Ottawa, Edmond Cloutier, 1948. 201 p.

Contains report on Marine Service Branch, Canadian Government Railways and Air Services Branch.

Eaton Manufacturing Co. A CHRONICLE OF THE AVIATION INDUSTRY IN AMERICA, 1903-1947; A SALUTE TO THE AVIATION INDUSTRY. Cleveland, Eaton Manufacturing Co., 1948. 98 p. Prepared for private circulation.

Lists chronologically by day, month, and year events of aviation including speed and altitude records; political, civil, and governmental developments affecting aviation; military developments and events; industrial developments; and aviation awards. Also listed for each year, alphabetically by company, company activities, including failures, consolidations, reorganizations, new organizations; inventions, enterprises, records, and significant contracts. Each page carries photographs of airplanes characteristic of the period under discussion.

Ray, Jim. THE STORY OF AIR TRANSPORT. Philadelphia, John C. Winston Co., 1947. 104 p. $2.50.

A brief history of the development of Air Transport in the United States. Reviewed by H. W. T., page 371 *supra.*

Regional Plan Association, Inc. AIRPORTS OF TOMORROW; report of the regional airport conference on its plan for development of an airport system for the New York metropolitan region. New York, 1947. 47 p. and appendices.

"The Regional Plan Association has steadfastly maintained that under

* This list was prepared especially for the JOURNAL by members of the Transportation Group, Washington Chapter, Special Libraries Association, Agnes A. Gatreaux, Librarian, CAA, Chairman. Annotations and listings were furnished by Mrs. Estelle Holland, American Airlines, Miss Hollis Piatt, A.T.A., Miss Marion S. Turley and Dr. Fred B. Tuttle, of CAA.

wise and competent leadership, New York, New Jersey and Connecticut, will solve the regional air transportation problem. They will provide the orderly development of an integrated plan that will preserve the New York Metropolitan Region as the world's greatest transportation center, land, sea and air. The Plan is presented in this volume . . ."

Rhyne, Charles S. AIRPORT LEASE AND CONCESSION AGREEMENTS. Washington, National Institute of Municipal Law Officers, 1948. 206 p.

A study of municipal airport management and operation covering, among other things, airport operating costs and revenues. Also contains model use, lease and concession agreements affecting airlines, fixed base operators and restaurateurs, with respect to airport charges and fees.

Van Zandt, J. Parker. WORLD AVIATION ANNUAL—1948. Washington, D. C., Aviation Research Institute, and Northfield, Vt., Norwich University, 1948. 544 p. $17.50.

Reviewed by E. J. Foley, page 372 *supra*.

Society of British Aircraft Constructors, Ltd. THE BRITISH AIRCRAFT INDUSTRY, 1948. London, Samson Clark & Co., Ltd., 1948. 279 p.

A directory of members and associate members of the SBAC. Text in English, French and Spanish. Contains a directory of registered trade names and branded or proprietary products.

U.S. Advisory Committee on Aviation Statistics. FACTS FOR AVIATION; a plan for the collection, compilation, analysis and publication of aviation statistics. Prepared at the request of the Air Coordinating Committee . . . and transmitted by the Bureau of the Budget. Washington, 1948. 2 parts.

The Advisory Committee is composed of representatives of the principal Federal agencies concerned with aviation which direct, coordinate or consult in the collection of statistics. The plan presented is designed to meet the principal needs for statistics related to (a) Federal use in making administrative or policy decisions; (b) use by several Federal agencies, or compilation by one agency for another; (c) needs of international organizations, including information whose supply is an obligation of the Government; (d) Congressional use, business use, or local government use; (e) comparisons with other modes of transportation.

U.S. Air Coordinating Committee, Subcommittee on Facilitation of International Civil Aviation. SIMPLIFYING INTERNATIONAL AIR TRANSPORTATION. Washington, Civil Aeronautics Administration, 1948. 59 p. Multilithed. Gratis.

An interim report of the progress made in resolving problems of air passenger, baggage and cargo entry and clearance facilitation, and of the efforts made to provide a continuous study of such problems and others that may arise with the objective of making international air travel easier for the passenger and shipper. The study is divided into sections that explain (1) accomplishments; (2) problems in connection with visa requirements; (3) problems under study, and (4) problems unresolved. Each section deals with each of the following services: Immigration, Health, Customs, Agriculture, Internal Revenue, Census, and Civil Aeronautics Board.

U.S. Department of State. INTERNATIONAL CIVIL AVIATION, 1945-1948. Report of the representative of the United States of America to the International Civil Aviation Organization. Washington, U.S. Govt. Print. Off., 1948. 40 p.

Many facts in this report are set forth in greater detail in the ICAO and PICAO council reports and the annual reports of the Air Coordinating Com-

mittee. "It is precisely because this material is spread through so many documents and is summarized in none that I have thought it desirable to tell the story here . . ." Contains charts of ICAO organization.

PERIODICAL ARTICLES—A SELECTED LIST

A. T. A. Policy, by E. S. Land. Aeronautical Engineering Rev., Mar. 1948, 7:20.

Air Subsidies Seen Justified in Future; House study group report, Public Aid to Air Transportation. Railway Age, Apr. 10, 1948, 124:724-5.

Can Airports Be Good Neighbors? American City, Apr. 1948, 63:19.

Civil Aviation Program in Latin America. Bulletin of the Pan American Union, Apr. 1948, 82:231.

Do Airlines Like Being Called Self-sufficient? It means low mail pay; CAB decision may be challenged, by S. Altschul. Barron's, May 3, 1948, 28:29-30.

Dynamic Aviation Scene; comments on the report of the Congressional Aviation Policy Board, by S. Altschul. Commercial & Financial Chronicle, Mar. 11, 1948, 167:1102.

15-year Growth of Domestic Air Lines; number of companies, planes and miles flown, passengers, mail and freight carried, fuel consumed; tabulations. Automotive Industry, Mar. 15, 1948, 98:127.

Flying Blind; Civil aviation policy. Economist, Mar. 6, 1948, 154:366-7.

Foreign Trade by Air, by G. Bekett. The Journal of Marketing, Apr. 1948, 12:505-6.

Freight Forwarder Plea Denied; CAB rejects proposed exemption. Aviation Week, Apr. 12, 1948, 48:42-3.

How the Airport Program Stands Today. American City, Mar. 1948, 63:15.

Integration of Scandinavian Air Lines, by C. F. Baldwin. Foreign Commerce Weekly, Apr. 3, 1948, 31:30.

Latin-American Route Battle; PAA and Panagra appeal to Congress and CAB to block new competitive Braniff and C & S service to south. Aviation Week, May 3, 1948, 48:42-3.

Nationalization of Britain's Transport. Public Utilities Fortnightly, Feb. 26, 1948, 41:307-8.

Operating Figures of British Airlines. Modern Transport, London, May 15, 1948, 59:9.

Pennsylvania Supreme Court Rules for Airport Operator; Chester County property owner test case, by A. McSurely. Aviation Week, Apr. 19, 1948, 48:42.

Power in the Air; an analysis of the President's Air Policy Commission report, Survival in the Air Age, by S. P. Johnston. Dun's Review, Mar. 1948, 56:14-16.

Progress of the Postwar Transition; domestic transportation in 1947. Survey of Current Business, Feb. 1948, 28:31-2.

Sale of Airline Certificates of Convenience and Necessity. Columbia Law Review, Jan. 1948, 48:88-104.

Transportation Industries; prospects for 1948, by E. F. Ross and others. Steel, Jan. 5, 1948, 122:138-43.

Wisconsin Aviation Case Law, a Brief Survey, by S. O. Arnold. Marquette Law Review, Dec. 1947, 31:193-201.